

Review of Crowdfunding Regulation

Interpretations of existing regulation
concerning crowdfunding in Europe, North
America and Israel

A Publication of the Tax & Legal Work Group
of the **European Crowdfunding Network**





DISCLAIMER

The content on this publication is offered only as a public service and does not constitute solicitation or provision of legal advice. This publication should not be used as a substitute for obtaining legal advice from an attorney licensed or authorised to practice in your jurisdiction. You should always consult a suitably qualified attorney regarding any specific legal problem or matter. The comments and opinions expressed on this site are of the individual author and may not reflect the opinions of the firm or any individual attorney.

IMPRESSUM

Review of Crowdfunding Regulation. Interpretations of existing regulation concerning crowdfunding in Europe, North America and Israel, 2013

Published by the European Crowdfunding Network AISBL

Editor: Oliver Gajda. Legal Editors: Tanja Aschenbeck-Florange, Thomas Nagel

This work is licensed under a Creative Commons

Attribution-NonCommercial-ShareAlike 3.0 Unported License.



FOREWORD	7
INTRODUCTION	9
AUSTRIA	10
1 Current Market of Crowdfunding platforms in Austria	10
2 Current Regulation of Crowdfunding platforms in Austria.....	11
3 Possible Regulation of Crowdfunding Platforms under the AIFMD Regime in Austria	15
4 Conclusion	18
5 Contact details of the authors:	19
BELGIUM.....	20
1 Current Market of Crowdfunding platforms in Belgium	20
2 Current Regulation of Crowdfunding platforms in Belgium.....	21
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Belgium	25
4 Conclusion	26
5 Contact details of the author:	27
BULGARIA.....	28
1 Current Market of Crowdfunding platforms in Bulgaria	28
2 Current Regulation of Crowdfunding platforms in Bulgaria.....	29
3 Status of AIFMD implementation	30
4 Conclusion	30
5 Contact details of the authors:	31
CANADA.....	32
1 Current market of Crowdfunding platforms in Canada	32
2 Current Regulation of Crowdfunding Platforms in Canada.....	34
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Canada.....	40
4 Conclusion	40
5 Contact details of the author:	41
CROATIA.....	42
1 Current Market of Crowdfunding platforms in Croatia	42
2 Current Regulation of Crowdfunding platforms in Croatia	42
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Croatia	45
4 Conclusion	46
5 Contact details of the authors:	47
CZECH REPUBLIC	48
1 Current Market of Crowdfunding platforms in the Czech Republic.....	48
2 Current Regulation of Crowdfunding platforms in the Czech Republic	48
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in the Czech Republic	51
4 Conclusion	53



5	Contact details of the authors:	54
DENMARK.....		55
1	Current Market of Crowdfunding platforms in Denmark	55
2	Current Regulation of Crowdfunding platforms in Denmark	56
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Denmark.....	58
4	Conclusion	58
5	Contact details of the author:	59
ESTONIA.....		60
1	Current Market of Crowdfunding platforms in Estonia	60
2	Current Regulation of Crowdfunding platforms in Estonia.....	61
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Estonia	64
4	Conclusion	65
5	Contact details of the authors:	66
FINLAND		67
1	Current Market of Crowdfunding platforms in Finland	67
2	Current Regulation of Crowdfunding platforms in Finland	67
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Finland	71
4	Conclusion	73
5	Contact details of the authors:	74
FRANCE.....		75
1	Current Market of Crowdfunding platforms in France	75
2	Current regulation of Crowdfunding platforms in France	76
3	Possible regulation of Crowdfunding platforms under the AIFMD regime	80
4	Conclusion	81
5	Contact details of the authors:	82
GERMANY.....		84
1	Current Market of Crowdfunding platforms in Germany	84
2	Current Regulation of Crowdfunding platforms in Germany	85
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Germany	88
4	Conclusion	90
5	Contact details of the authors:	91
GREECE.....		92
1	Current Market of Crowdfunding platforms in Greece	92
2	Current Regulation of Crowdfunding platforms in Greece	93
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Greece	96
4	Conclusion	96
5	Contact details of the authors:	97



HUNGARY	98
1 Current Market of Crowdfunding platforms in Hungary	98
2 Current Regulation of Crowdfunding platforms in Hungary	98
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Hungary.....	102
4 Conclusion	102
5 Contact details of the author:	103
IRELAND	104
1 Current Market of Crowdfunding platforms in Ireland	104
2 Current Regulation of Crowdfunding platforms in Ireland.....	105
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Ireland.....	107
4 Conclusion	107
5 Contact details of the authors:	108
ISRAEL	109
1 Current market of Crowdfunding platforms in Israel	109
2 Current regulation of Crowdfunding platforms in Israel	109
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Israel	113
4 Conclusion	113
5 Contact details of the authors:	113
ITALY	114
1 Current Crowdfunding Models in Italy.....	114
2 Current Regulation of Crowdfunding platforms in Italy	115
3 Possible regulation of Crowdfunding platforms under the AIFMD regime	117
4 Conclusion	118
5 Contact details of the authors:	119
LATVIA	120
1 Current Market of Crowdfunding platforms in Latvia	120
2 Current Regulation of Crowdfunding platforms in Latvia	120
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Latvia	123
4 Conclusion	125
5 Contact details of the authors:	125
LITHUANIA	126
1 Current Market of Crowdfunding platforms in Lithuania	126
2 Current Regulation of Crowdfunding platforms in Lithuania	126
3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Lithuania.....	131
4 Conclusion	131
5 Contact details of the authors:	132
LUXEMBOURG	133
1 Current Market of Crowdfunding platforms in Luxembourg	133
2 Current Regulation of Crowdfunding platforms in Luxembourg.....	133



3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Luxembourg	135
4	Conclusion	136
5	Contact details of the author:	136
THE NETHERLANDS.....		137
1	Current Market of Crowdfunding platforms in The Netherlands	137
2	Current Regulation of Crowdfunding platforms in The Netherlands	138
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in The Netherlands	140
4	Conclusion	141
5	Contact details of the authors:	141
PORTUGAL		142
1	Current Market of Crowdfunding platforms in Portugal	142
2	Current Regulation of Crowdfunding platforms in Portugal	143
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Portugal	145
4	Conclusion	145
5	Contact details of the authors:	146
ROMANIA		147
1	Current Market of Crowdfunding platforms in Romania	147
2	Current Regulation of Crowdfunding platforms in Romania	149
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Romania	152
4	Conclusion	153
5	Contact details of the authors:	154
SLOVAK REPUBLIC		155
1	Current Market of Crowdfunding platforms in the Slovak Republic	155
2	Current Regulation of Crowdfunding platforms in the Slovak Republic	155
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in the Slovak Republic	157
4	Conclusion	159
5	Contact details of the author:	159
SLOVENIA		160
1	Current Market of Crowdfunding platforms in Slovenia	160
2	Current Regulation of Crowdfunding platforms in Slovenia	160
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Slovenia	163
4	Conclusion	165
5	Contact details of the author:	165
SPAIN		166
1	Current Market of Crowdfunding platforms in Spain	166
2	Current Regulation of Crowdfunding platforms in Spain	166



3	Possible regulation of Crowdfunding platforms under the AIFMD regime	168
4	Conclusion	168
5	Contact details of the authors:	169
SWEDEN		170
1	Current Market of Crowdfunding platforms in Sweden	170
2	Current Regulation of Crowdfunding platforms in Sweden	170
3	Possible regulation of Crowdfunding platforms under the AIFMD regime in Sweden	172
4	Conclusion	172
5	Contact details of the authors:	173
SWITZERLAND		174
1	Current Market of Crowdfunding Platforms in Switzerland	174
2	Current Regulation of Crowdfunding Platforms in Switzerland	175
3	Conclusion	181
4	Contact details of the author:	182
UNITED KINGDOM		183
1	Current Market of Crowdfunding platforms in UK	183
2	Current Regulation of Crowdfunding platforms in UK	184
3	Conclusion	187
4	Contact details of the authors:	188
UNITED STATES		189
1	Current Market of Crowdfunding Platforms in the United States	189
2	Current Regulation of Crowdfunding platforms in the United States	190
3	Possible Regulation of Crowdfunding Platforms under the AIFMD Regime in the United States	192
4	Conclusion	192
5	Contact details of the authors:	193
Summary – Regulation of Crowdfunding in Europe, North America and Israel		194

FOREWORD

The rise of crowdfunding over the past decade is a result of the on-going digitalisation of processes and communication in our society, with easy access to high-speed internet and digital devices. But crowdfunding has recently been moved to the forefront in the discussion on access to finance. This is a result of the economic crisis and the associated market failures of the incumbent financial services industry, which provides financing to small- and medium-sized enterprises (SMEs).

Europeans save their money, rather than assume risk by investing it in small enterprises and they admire established institutions, rather than the entrepreneurs who built them. According to statistics, some 30% of SMEs face liquidity problems and only 30% of SMEs access bank credit at any given time. Plus the availability of bank loans for SMEs has declined by 23% over recent years, while collateral requirements have increased by 34% and interest rates by 54%. Still, SMEs are the main contributors to job creation and represent some 67% of all jobs in Europe.

This drastic lack of funding for SMEs has a visible impact on Europe's economy. It is the key reason why we are currently witnessing a lively discussion on crowdfunding, which involves political actors of the highest level, such as the Vice President of the European Commission Neelie Kroes, the European Commissioner for the Internal Market Michel Barnier and the French President François Hollande.

However, the fragmentation of the European Union is a key hurdle for crowdfunding – as it has been for the venture capital industry, too. True, national laws allow for local crowdfunding industries to grow, but the markets are limited in size and do not offer room for scale. The different legislations and interpretations of European Directives will effectively prohibit a healthy European industry from emerging across borders. This fragmentation also concerns a number of other related issues, including e-commerce laws, tax rules and company laws.

In this light, it is alarming for the potential of SME finance that crowdfunding may be regulated on a national basis, without a common pan-European principle. So far, national financial services regulators have been slow to reach out to their counterparts in other European countries in order to build a joint position. On a national level, both the French and the UK financial services regulators are currently working on crowdfunding regulation. In Luxembourg we have seen political messages promising a change of regulation with regard to crowdfunding, whereas in Italy, crowdfunding has already been regulated and the authorities are looking at ways of improving the new laws. In Austria the Parliament has changed some laws in favour of crowdfunding earlier this year with more expected to come and in Portugal there have been on-going discussions, just like in the Netherlands.

The European Crowdfunding Network (ECN) has been involved in one way or the other in many of these - and other - processes. We believe in the opportunities crowdfunding can offer the European economy, but there are no rights and wrongs for now, the industry is still emerging and opportunities and dangers need to be weighed with care. The European Commission will not be able to solve this alone, we need cooperation across borders, also with regard to politics. Many European investors and entrepreneurs need the possibility to be active across the Union in order to build synergies and scale, others will be sufficiently happy with a local or regional solution. It is important to address the needs and protect the interests of all.



The ECN set out nearly two years ago to launch a public discourse on crowdfunding in Brussels and across Europe. Since then, the European Commission has already made several high level statements in support of crowdfunding, but more importantly, is currently discussing across different Directorate Generals a common position on crowdfunding. To this extent we expect a public statement, even an official opinion, from the European Commission in 2014.

The ECN brings together crowdfunding platforms and stakeholders across Europe in building a professional and transparent industry. When we started, there had been no significant political interest in crowdfunding. We saw the potential of crowdfunding across financial services and consumption and realised from past experience that the industry needed a proactive voice that could instigate discussions at the highest levels.

Now that we have a political discourse in Europe, we are also going to focus on the aspects of professional conduct and transparency. We believe that crowdfunding has to engage proactively with its customers and stakeholders, with more openness and honesty than traditional services firms. This requires professional standards, best behaviours and open data provision as well as on-going evaluation and monitoring. Our main members are crowdfunding platforms, but we also welcome other stakeholders with an interest in establishing a European crowdfunding industry, such as law firms, consultancies, traditional services, industry and academics.

The European Crowdfunding Network is extremely grateful to every single contributor to this paper, who has given her or his expertise free of charge and in a very short time frame. There are too many people involved to mention them all here, but the reader can find their contact details at the end of each contribution. When we presented the idea to Tanja Aschenbeck-Florange of Osborne Clarke, Germany, she immediately understood the value and committed her time and that of her team. This paper would not have happened without her. Together with her colleague Thomas Nagel, she is responsible for the majority of the legal editing. We also thank Reid Feldman of Kramer Levin, France, who came forward on his own accord and supported the editing work. There are many other people that have helped in other ways and we are grateful for their support, too. We trust that this paper will be a key tool for regulators across Europe and beyond, for entrepreneurs, investors and any other interested stakeholder. Let us shape the future of crowdfunding together.

Oliver Gajda

Chairman and Co-Founder, European Crowdfunding Network, Belgium



INTRODUCTION

Crowdfunding is an increasingly popular method of raising capital over the internet from the mass market. Its earliest successes have often been with social or art-based projects. But it is now emerging as a fund-raising method for start-up companies or other commercial projects (this kind of Crowdfunding is also called "Crowd Investing").

Crowdfunding can be very beneficial for both sides. It provides for an alternative method of financing which can be attractive where borrowers struggle to qualify for full funding from traditional sources, such as banks, private equity houses and angel investors. Crowd investors on the other hand can invest directly into enterprises/projects that have not previously been available to retail investors.

Due to the benefits Crowdfunding provides for the financing of small and medium-sized enterprises, the European Commission has indicated an intention to support Crowdfunding. For example in its Green Paper on long-term financing of the European economy published on 25 March 2013 the European Commission raises the question how *"non-traditional sources of finance, such as crowd-funding, can be supported"*. On 3 October 2013 the European Commission has started a public consultation asking for opinions on a (possible) harmonised regulation of Crowdfunding until 31 December 2013. According to the European Commission the aim of this public consultation is *"to explore how EU action, including soft-law measures, could promote Crowdfunding in Europe"*. On the other hand, the Commission has traditionally displayed strongly consumer-protectionist tendencies and certain public pronouncements it has made indicate that any benefits it may be able to confer through the creation of a harmonised single market may well be outweighed by regulatory burden.

Crowdfunding is already restricted by national regulatory provisions, but the continuing development of the European single market in financial services has and will continue to ensure that there is a small degree of conformity between those national regimes, even absent any Crowdfunding-specific European regulation. Further it can be anticipated that Crowdfunding could be even more restricted under the future AIFMD regime.

This publication considers the varying applications of the single market legislation to Crowdfunders across Europe both now and in the foreseeable future. Furthermore it takes a look at the Crowdfunding regulation in other relevant countries abroad.

Tanja Aschenbeck-Florange, LL.M

Partner, Osborne Clarke, Germany



AUSTRIA

1 Current Market of Crowdfunding platforms in Austria

In Austria there are four types of Crowdfunding:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The Equity Model is one of the most important ways for people to invest in Crowdfunding projects. Investment either implies taking part in profit and loss (e.g. as a shareholder of capital companies or companionships), or taking part in profits only, under the exclusion of sharing losses (e.g. with some kinds of silent partnerships).

Looking at the Equity Model, one can find Crowdfunding platforms which are active in the business of investment broking and/or contract broking and do not obtain any license in the sense of the Federal law on Banking (*Bankwesengesetz – BWG*). They operate outside the prospectus regime and must therefore comply with the legally defined exemptions (for more details see section 2.3 hereof). The main field of the aforementioned Crowdfunding platforms works with the model of silent partnerships.

On the other hand, some Crowdfunding platforms operate within the scope of regulation especially of the Federal Law on Banking. Those platforms offer a trade market for security papers (*Wertpapiere*) or investment products (*Veranlagungen*) and therefore have to obtain a licence for financial services under the Austrian Federal Law on Banking. Entrepreneurs issuing security papers (*Wertpapiere*) or investment products (*Veranlagungen*) to investors by means of a public offer can be subject to a prospectus requirement approved by Financial Market Authority according to the Capital Market Act (*Kapitalmarktgesetz – KGM*). Moreover, certain investment services might require a license of the Financial Market Authority in the sense of the Federal Law on the Supervision of Securities (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*).

1.2 The Purchase Model

Some Crowdfunding platforms, especially so-called “citizen-powerplants” (*Bürgerkraftwerke*), are based upon a sale-and-lease-back-model. Citizens buy single parts of a facility (e.g. cells of a solar power station) and lease it back to the operating company.

As a principle, the conclusion of respective purchase and lease contracts are neither subject to a licence according to the Federal Act on Banking or the Federal Law on the Supervision of Securities, nor to any securities prospectus requirements.

1.3 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Some Crowdfunding platforms offer loans (*Darlehen*) or subordinated loans (*Nachrangdarlehen*). Hence, individuals lend money to a Crowdfunding platform, which in the end returns money with interest to the lender. In this model, the investor does not share liability for any losses.

Such loans or subordinated loans can, under certain circumstances, fall under the definition of the commercial acceptance of foreign funds for management or as deposits (deposit business; *Einlagengeschäft*) and therefore require a license of the Financial Market Authority (*Finanzmarktaufsicht – FMA*).

Bonds are another possibility to receive money from investors. Bonds in general do not require a licence according to the Federal Law on Banking or the Federal Law on the Supervision of Securities, if marketable bearer bonds or registered bonds are issued.

1.4 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Models are mainly used to finance social, charity or creative projects or companies. Monetary returns are not envisaged for investors who fund projects or companies and they either get no return at all or a non-monetary reward (e.g. tickets or other rewards of a rather symbolic value).

2 Current Regulation of Crowdfunding platforms in Austria

2.1 Licence under the Federal Law on Banking and the Federal Law on the Supervision of Securities

2.1.1 Equity Model

Investment Services, Noncore Investment Services, Financial Instruments and Assessments

The Federal Law on the Supervision of Securities rules investment services (*Wertpapierdienstleistungen*), noncore investment services (*Nebendienstleistungen*), financial instruments (*Finanzinstrumente*) and assessments (*Veranlagungen*). As to Crowdfunding models, especially the terms of financial instruments and assessments matter:

- Financial instruments, amongst others, are shares in transferable securities and instruments (e.g. stocks, certificates, loans).
- Assessments are, amongst others, uncertificated property rights, which serve as a direct or indirect investment for several investors, who bear – either alone or together with the issuer – the risk, and provided that investors do not manage the property rights (e.g. uncertificated holdings, limited partner participation, closed-end funds).

The Federal Law on the Supervision of Securities contains organizational requirements as well as good conduct rules, in which the latter can apply either directly or indirectly (which means an applicability to services, which in general do not fall under the regime of the Federal Law on the Supervision of Securities). For any services, which fall under the regime of the Federal Law on the Supervision of Securities, the Financial Market Authority is the competent controlling institution, whereas the Trade Office (*Gewerbebehörde*) is competent for any services, which fall upon the regime of the Federal Law on the Supervision of Securities indirectly (e.g. for commercial property consultants that solely convey assessments).

According to the Federal Law on the Supervision of Securities, the commercial provision of the following investment services requires a license of the Financial Market Authority:

- rendering of investment advice in relation to financial instruments;
- portfolio management by managing portfolios for individual customers with a discretion under a power of attorney of the customer, unless the customer portfolio contains one or more financial instruments;
- acceptance and transmission of orders in relation to subjects of one or more financial instruments;
- operating a multilateral trading facility.

Hence, the above mentioned services can only be rendered if either a discrete licence of the Financial Market Authority exists or one cooperates with a securities company or a credit institution as an auxiliary person.

Protection of Investors

The Federal Law on the Supervision of Securities contains provisions regarding the protection of investors. In order to avoid any liability of the operator of a Crowdfunding platform for investors' possible losses, it should be considered not to raise investors' false expectations. Services of the operator of a Crowdfunding platform should be restricted to the acceptance and forwarding of orders of customers (execution-only-orders).

Other investment services

The right to provide other investment services and ancillary services than mentioned above under the heading Investment services, noncore investment services, financial instruments and assessments by companies established in Austria's national territory is governed by the Federal Law on Banking. The latter rules the business of credit institutions and financial institutions, which, in principle, requires a license of the Financial Market Authority.

Also, the commercial assignment of credits and financing is subject to the Federal Law on Banking, whereas the commercial investment counselling is subject to the Trade Law (*Gewerbeordnung – GewO*) and also comprises the procurement of participations, loans and investments. Such activities have to be dissociated from so-called *loro-emissions* (*Loroemissionsgeschäft*), i.e. the adoption of the placement of emissions of third parties, which are reserved to credit institutions.



Summary

To sum up, when one offers investment services, noncore investment services, or – important for Crowdfunding operators – financial instruments or assessments, the Federal Law on the Supervision of Securities might apply and therefore a license of the Financial Market Authority may have to be obtained. If other investment services and ancillary services than covered by the Federal Law on the Supervision of Securities are provided the Federal Law on Banking might apply.

2.1.2 Lending Model

In a startling administrative proceeding, the Financial Market Authority ruled that commercial collection of loans on the basis of standardized loan agreements by a company, which uses such loans for the financing of its on-going business and pays these loans back with interest after a definite period, falls within the scope of para 1 subpara 1 figure 1 of the Federal Law on Banking and is therefore a commercial acceptance of foreign funds for management or as deposits (deposit business; *Einlagengeschäft*), a business reserved to credit institutions and requiring a license of the Financial Market Authority (FMA UB0001.200/0017-BUG 2012). The Constitutional Court (*Verfassungsgerichtshof – VfGH*) refused to handle a complaint against the aforementioned decision (B 54/13-11), which was disposed to the Highest Administrative Court (*Oberster Gerichtshof – OGH*).

By contrast, the emission of loans or subordinated loans does not constitute an assessment in the sense of the Federal Law on the supervision of securities.

Recently an action group called “Citizens' freedom of General Lending” (*“Bürgerinitiative Allgemeine Freiheit der Kreditgewährung”*) filed a proposal for the “Citizens Direct Loan Act 2013” (*“BürgerInnen-Direkt Darlehensgesetz 2013”*), which aimed at facilitating Crowdfunding by means of loans, but was not adopted by Parliament (17/SN-516/ME XXIV. GP).

2.1.3 Donations or Rewards Model

Depending on the structure in detail, there are good reasons to state that these kinds of investments do not qualify as assessment products (*Veranlagungen*) and therefore should usually fall outside the jurisdiction of the Federal Law on Banking.

2.2 Licence under the Payment Services Supervision Law

A transfer of funds between investors and the operator of a Crowdfunding platform can constitute remittance services (*Zahlungsdienste*) in the sense of the Payment Services Act (*Zahlungsdienstegesetz – ZaDiG*). Such a transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform, who passes the funds on to an entrepreneur.

The Payment Services Act provides for various legal institutes, which are excluded from the applicability of this law; this applies, amongst others, to commercial agents (*Handelsagenten*). Under various circumstances, especially provided that the operator of a Crowdfunding platform has the authorisation to negotiate, or negotiate contracts, on behalf of the funder and the fund seeker, the operator of a Crowdfunding platform may be regarded as a commercial agent.



As an alternative – in order to avoid licensing requirements – the operator of a Crowdfunding platform could use an external provider or partner for processing payments instead of acting as an intermediary himself.

2.3 Prospectus Requirements

General Rule

Entrepreneurs issuing security papers (*Wertpapiere*) or investment products (*Veranlagungen*) to investors by means of a public offer can be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by the Financial Market Authority.

The legal basis for publicly offering security papers or investment products for sale is the Capital Market Act (*Kapitalmarktgesetz – KGM*). In addition, EU Regulation Nr 809/2004, as amended, establishes the legal framework for drawing up prospectuses for investments. If the prospectus includes securities for admission to the stock exchange the Stock Exchange Act (*Börsegesetz – BörseG*) also applies.

A “*public offer*” is a notification to the public in any form and distributed in any way, which contains sufficient information on the conditions of the offer to allow an investor to decide whether or not to buy or subscribe to the securities or investments. The operator of a Crowdfunding platform is not usually subject to such a prospectus requirement, provided that he, or she, will not be responsible for the “*public offering*”. However, if the operator of a Crowdfunding platform merchandises the Crowdfunding project via a website and hereby makes a public offer, a prospectus might have to be published.

Depending on the structure, subordinated loans do not generally constitute assessments under the Capital Market Act and therefore no prospectus might be required. The same should apply to investments where individuals provide money to a company or project for benevolent reasons or for a non-monetary reward (Donations or Rewards Model).

Exceptions from Prospectus Requirement

The general prospectus requirements do not apply in exceptional cases exhaustively named in para 3 of the Capital Market Act, amongst others for offering security papers or investments products in the European Union for a total consideration of less than EUR 250.000,--, calculated over a period of twelve months.

Moreover, the general prospectus requirements do not apply for offers, targeted at less than 150 natural or legal persons per member state of the European Economic Area, if such persons are not qualified investors. In general, if Crowdfunding projects are available (e.g. advertised) via Internet, a public offer to more than only 150 natural or legal persons is at hand.

2.4 Possible Additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Trade Law;
- Law regarding the Supervision of Securities;
- Consumer Credit Regulation (*Verbraucher kreditgesetz – VKrG*);
- Consumer Protection Act (*Konsumentenschutzgesetz – KSchG*).

3 Possible Regulation of Crowdfunding Platforms under the AIFMD Regime in Austria

3.1 Status of AIFMD Implementation

Austria implemented the European Alternative Investment Fund Managers Directive (*AIFMD*), which had to be implemented to national law before July 22nd, 2013, by the Alternative Investment funds Manager Act (*Alternative Investmentfonds Manager-Gesetz – AIFMG*).

The AIFMG is heavily based on the AIFMD and in some parts corresponds literally to the AIFMD. Yet contrary to the AIFMD, the AIFMG also provides the legal possibility to disperse alternative investment funds to private customers.

3.2 Definition of an Alternative Investment Fund

The scope of the AIFMD is a broad one: The AIFMD is aimed at the managers of Alternative Investment Funds (*AIFM*). The AIFMD is applicable when either the alternative investment fund is authorized pursuant to relevant national law in a member state or its registered office or head office in a member state and / or the manager of an Alternative Investment Fund (*AIF*) has its registered office in the European Union.

Due to the broad scope of the AIFMD, whether or not any of the participants qualify as an Alternative Investment Fund or an Alternative Investment Fund Manager is crucial to the impact of the national AIFMD regulations on Crowdfunding. As defined in the AIFMG, an Alternative Investment Fund is any organ for a collective investment undertaking which,

- on the basis of a stipulated portfolio strategy
- raises capital from a number of investors,
- with a view to investing it in accordance with a defined investment policy
- for the benefit of those investors
- as long as the money collected does not directly serve for operational activities.

However, any organs that require a permit under the Directive 2009/65/EC (UCITS), is excluded from the definition of an alternative investment fund.

In its explanatory remarks regarding the AIFMG, when dealing with the term of an Alternative Investment Fund, the Austrian legislator widely refers to the directive 2011/61/EC and Article 4 thereof. Hence, the definitions of Alternative Investment Funds made by European entities should be taken into account when talking about the term of an alternative investment fund.

With regard to the requirement that the money collected does not directly serve for operational activities, the European Securities and Markets Authority (ESMA) in its consultation paper on "*Guidelines on key concepts of the AIFMD*" published on December 19th, 2012, ("*ESMA Consultation Paper*") considers that "*an ordinary company with general commercial purpose should not be considered a collective investment undertaking*".

In its brochure "*Frequently asked questions regarding the applicability of the AIFMG*" from July 30th, 2013, the Financial Market Authority clarifies that the examination of the question, whether an organ is to be classified as an AIF, must in any case be done on an individual basis, taking regard to the structural and content factors and not the pure form of an organ. Moreover, the Financial Market Authority refers to the "*Final Report – Guidelines on key concepts of the AIFMD*" of the European Securities and Markets Authority dated May 24th, 2013.

3.2.1 Company Seeking Funding

As stated above, the AIFMG does not apply if money collected does directly serve for operational activities. In general, a classification of Alternative Investment Funds can be made following the following criteria:

- The main business purpose of Alternative Investment Funds should not be directed on the purchase / sale or supply of goods or services that are not part of the financial services sector. In the presence of an operational main business purpose (commercial or industrial purpose), the presence of an Alternative Investment Fund can be excluded as a principle.
- The collection of actual capital includes cash transfers as well as fixed financial commitments to the investor ("commitment"). The process of collecting does not need to happen constantly, but can also be satisfied by a one-time process.
- The acquisition of shares must be open to a wide range of investors, but it is sufficient if only one investor actually invests. Excluded are vehicles that, due to legal regulations or Articles of Association (Fund Regulations), are only open to one investor.
- The investment strategy must be defined and be binding for the manager; the transfer of investment decisions to a third party can be possible. In contrast to conventional mutual funds, the investment strategy need not be aligned with the point of view of risk spreading.

Companies seeking funding by means of a Crowdfunding platform could only be operating companies outside the financial sector if

- their business strategy is simply the commercial success of their business,
- they do not intend to follow any defined investment policy, but want to finance their on-going day-to-day business, and
- *they operate the facility, production or project themselves within their day-to-day business.*

In general, these requirements are met by the typical start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, so that those companies mentioned before should usually fall outside the scope of the AIFMG.

As there are no consistent European guidelines regarding the term of an Alternative Investment Fund, the Financial Market Authority acclaims that, if it is located in the legal interests of a party, it is possible to obtain a notice of assessment (*Feststellungsbescheid*) by the Financial Market Authority on the issue whether an operating company is an Alternative Investment Funds or not. The rationale for a legal interest as mentioned before could be that otherwise the risk of an injury of punitive regulations is reinforced. If the determination desired has been to not be classified as an Alternative Investment Fund, it is incumbent on the party to demonstrate the relevant evidence and documented.

Finally, it has to be noted that Alternative Investment Funds are facilitated when the assets acquired through leverage do not exceed a total of EUR 100 Mio. or total assets do not exceed EUR 500 Mio. (*“de minimis-barrier”*). Although such Alternative Investment Funds must be registered with the competent authority, the other conditions regarding the licensing do not apply to those funds, which fall below this amount's specified limits.

3.2.2 Project Company Seeking Funding

Equity Model

Although neither the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts have dealt with this question, we assume that, following the notion of the German BaFin relating to the comparable German law, companies cannot qualify as *operating companies* if they are established as a “project company” to finance a single project and do not operate the facility or production themselves.

Accordingly, it cannot be excluded that this kind of "Project Company" might constitute an AIF within the meaning of the AIFMG, if it seeks funding in return for a share in the profits or revenue generated by the project.

Lending Model

A subordinated loan (*“Nachrangdarlehen”*) should generally be capable of being structured as a non-AIF investment, provided that the investor does not share liability for any losses. However, this issue has not been dealt with by the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts.



Donations or Rewards Model

Some of the Project Companies do not offer any kind of revenue, but instead return non-financial rewards. Although neither the AIFMG, nor the explanatory notes hereto, nor the Financial Market Authority or courts have dealt with this question, we assume that, in the latter case it can be argued that the funds are not invested *for the benefit of those investors* and the funding therefore contains no collective investment undertaking and no alternative investment funds.

3.2.3 Crowdfunding Platform

As a general rule, since the operator of a Crowdfunding platform does not raise capital from investors for his or her own business, it should not qualify as an Alternative Investment Fund. Even if the underlying investment qualifies as an Alternative Investment Fund there are persuasive reasons to state that the Crowdfunding platform does not "*manage*" this underlying investment, but that the Crowdfunding platform merely arranges investment into it. The manager of the Alternative Investment Funds is typically the company seeking funding by means of the Crowdfunding platform.

To sum up, there are sound arguments that a Crowdfunding platform in general should not qualify as an Alternative Investment Fund in the sense of the AIFMG.

4 Conclusion

In conclusion, Crowdfunding is regulated extensively in Austria:

As to the provisions of capital market law, under various circumstances, the operator of a Crowdfunding platform might demand a licence according to the Federal Law on Banking or the Federal Law on the Supervision of Securities.

Moreover, entrepreneurs issuing security papers or investment products to investors by the means of a public offer can be subject to a requirement to publish a prospectus, except for exemption clauses to be applicable in individual cases.

The application of the Alternative Investment Fund's Manager Act (AIFMG) to companies seeking funds by means of Crowdfunding platforms would make any attractive cost-reward ratio impossible. Yet, the Alternative Investment Fund's Manager Act is not applicable if money collected directly serves for operational activities, which, in several cases, can be for the benefit of Crowdfunding operators, too.

In consideration of the strict rules of Austrian capital market, there are discussions on-going whether financing models such as Crowdfunding platforms should be liberalized and decontrolled, yet no precise amendment of law is in sight.



5 Contact details of the authors:

Dr. Stefan Schermaier
Managing Partner
schermaier@tsm-law.at



Mag. Dorian Schmelz
Associate
schmelz@tsm-law.at



Tonninger, Schermaier, Maierhofer &
Partner Rechtsanwälte
Rilkeplatz 8
1040 Vienna
Austria

Tel +43 1 218 44 40 44
www.tsm-law.at





BELGIUM



1 Current Market of Crowdfunding platforms in Belgium

In Belgium, there exist three broad types of Crowdfunding:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In Belgium, there is uncertainty as to whether direct offerings of equity through a Crowdfunding platform qualify as a regulated financial service (e.g. a placement of financial instruments) requiring a licence as an investment firm.

As a consequence, the two Crowdfunding platforms that cater to businesses in Belgium do not offer direct equity participation. Both of them use the Lending Model.

One of them has fully opted for that model as the company being funded borrows money from the crowd through a loan note (see below for further details).

The other one tries to some extent to come close to the Equity Model by issuing exit-sharing notes ("Notes") through a holding company. The Notes, which are debt instruments, are only reimbursed once either 100% of the shares held by the holding company (a professional company, co-investing along with the crowd) are sold (in the case of success) or once the funded company has been liquidated (in the case of failure). Indirectly, therefore, the crowd is exposed to losses. The timing of repayment of the notes is rather unclear and is controlled by the professional co-investor(s). The crowd has no say in the funded company. This type of platform operates within the prospectus regime as it raises more than EUR 100,000 within 12 months, mostly from professional investors (acting in the course of business). The crowd co-invests, albeit indirectly through the Notes, along with the professional investors.

The only Crowdfunding platform to have offered direct equity participation in the funded company has had to suspend operations because, in order to avoid potential application of the regulatory framework applicable to investment firms, it waived its entire fees for its services. A Crowdfunding platform providing direct equity investment can avoid its services qualifying as financial services if it is not paid for those services. Obviously, this is not a financially viable proposition.

There are no licensed platforms offering equity Crowdfunding to the general public in Belgium.

In sum, pure, unlicensed equity Crowdfunding is not currently available in Belgium. The crowd never obtains a direct equity participation (and voting rights) in the funded company.



1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Loans or debt instruments, such as the aforementioned Notes, are not deemed “financial instruments” falling under the regulation of investment service firms. As a result, in Belgium, crowd-financing of businesses has mostly developed through the Lending Model.

That said, the Lending Model has its own limitations. For instance, there are no consumer-to-consumer lending platforms operating in Belgium. This is due to regulatory constraints stemming *inter alia* from the consumer credit legislation.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for philanthropic reasons or for a non-monetary reward)

The Donations or Rewards Model was the first to develop in Belgium. It developed primarily in the music industry, and with some international success, as the platform was one of the first of its kind in Europe.

There is a general perception in the Belgian Crowdfunding market that specialist Crowdfunding platforms have a competitive advantage. As a result, we see a variety of specialist Crowdfunding platform developing or about to start under the rewards model. These tend to be in the creative sector (music, movies, fashion, etc.).

Non-for-profit organizations involved in financial, social or artistic projects have also been amongst the first to use the Rewards Model.

The rewards-based platforms all operate as unlicensed platforms, and outside the prospectus regime.

2 Current Regulation of Crowdfunding platforms in Belgium

There are numerous laws that might potentially apply to the equity and lending models, depending on the finance structure used by the Crowdfunding platform. We list and summarize the main ones below.

Donation and rewards-based models usually fall well outside the definition of financial services, financial or investment instruments and the Prospectuses Act. They therefore fall outside the most restrictive aspects of Belgian financial regulation, provided due attention is paid to the collection of public savings issue.

Given the rise in applications that Belgium’s Financial Services and Markets Authority, has received from potential promoters of Crowdfunding platforms, the FSMA also issued a summary of them on 12 July 2012, with an overview of the regulatory framework applicable to Crowdfunding operations and a related FAQ section.

2.1 Supervision of investment firms

Pursuant to MIFiD, the Act of 6 April 1995 (as amended) regulating investment firms defines “investment services” inter alia as the reception and transmission of orders in relation to one or more financial instruments, the execution of orders on behalf of clients, investment advice and the placing of financial instruments with or without a firm commitment basis.

“Financial instruments” include securities such as shares, bonds and other debt instruments. The definition of financial instrument used for the regulation of investment firms is narrower than that of “investment instruments” under the Prospectuses Act, which includes all types of instruments (including debt instruments) allowing of a financial investment, whatever the nature of the underlying assets.

In Belgium, there is uncertainty as to whether merely providing a subscription module allowing people to subscribe for financial instruments through a Crowdfunding platform, even without active involvement by that platform, constitutes a regulated financial service and, more specifically, the service of placing financial instruments without a firm commitment. If it does, Crowdfunding platforms enabling the crowd to invest direct in financial instruments have to apply for a licence as an investment firm. Such licences are excessively burdensome and costly for Crowdfunding platforms.

Licensed financial services firms or intermediaries do not offer Crowdfunding services in Belgium.

With respect to the placing of Financial Instruments, the Banking, Finance and Insurance Commission (CBFA, the forerunner to the FSMA) clarified in a 2004 board report that the following factors are indicative that a regulated “placement service” is being offered:

- the existence of an agreement (whether written or oral) between the issuer and the financial intermediary whereby the intermediary acts on behalf of the issuer;
- a consideration paid by the intermediary to the issuer.

The CBFA has further indicated that these indicators are usually accompanied by the financial intermediary providing marketing and advertising services, and “door-to-door” selling to, or cold calling of, potential investors.

These indicators do not sufficiently clarify whether a Crowdfunding platform will be automatically deemed to provide “placement services” when it merely passively facilitates the placement of financial instruments. In particular, it has been pointed out that most Crowdfunding platforms do not actively promote the offered securities (no road shows, no specific marketing devices, etc.). Usually, the issuer seeking the funds does the promotion direct (through the communication modules offered by the platform and other social networks), while the platform (management) often does not actively participate in that promotion exercise.

Pending further clarification, Crowdfunders have already inferred from the above that, if they do not receive any consideration (which is economically unviable) for the services offered, no licence is required as an investment firm. To qualify as an investment firm, these services must be provided on a professional basis.



The licensing requirements for financial intermediaries are not linked to the thresholds laid down in the Prospectuses Act. Therefore, a platform offering placement services for offerings of less than EUR 100,000 (private placements) will still be considered a financial service firm, and will have to be licensed.

The FSMA has further pointed out that Crowdfunding platforms organizing a market for the financial instruments offered through the platform could be considered a multilateral trading facility, which also requires a licence.

2.2 Bank monopoly for the collection of public savings

In principle, only credit institutions (and the like) are authorized to collect deposits and other repayable funds from the public in Belgium (section 68*bis* Prospectuses Act, previously regulated under the Banking Act).

This is a fundamental problem as Crowdfunding platforms often collect funds, which they pay back to the crowd if the minimum target financing is not achieved. Luckily, from the very inception of rewards-based Crowdfunding, the FSMA has accepted that, subject to certain guarantees and given the limited funds that each investor usually invests in a Crowdfunding project (usually a few hundred euros), the funds stockpiled by Crowdfunding platforms are not considered as falling within the scope of the banking monopoly.

In this respect, Crowdfunding platforms need to build in adequate contractual and other guarantees to make sure that the collected funds cannot be used for any other purpose than either reimbursing the investor (if the fundraising venture fails) or investing in the project (in the case of success).

In its earliest stage, because of that, Crowdfunding platforms set up non-profit organizations to collect the funds. The articles of association of these non-profit organizations offered additional guarantees regarding the limited use that could be made of the collected funds. Lately, it has been found to be sufficient for the general terms and conditions of the platform and the conditions of the specific account to provide such guarantees, e.g. by using special escrow bank accounts.

Lending-based Crowdfunding platforms, whose core business is to obtain repayable funds from the public through the issue of debt instruments, fall within scope of the banking monopoly. They circumvent that monopoly either by collecting non-repayable funds (i.e. by collecting the funds at the end, once the funding operation's success is already secure and it is certain that no funds will need to be repaid) or by issuing a prospectus, as the Prospectuses Act provides for an exemption.

2.3 The Act on Collective Investment Schemes (2012)

Crowdfunding platforms that use a holding structure to pool collective investments in various funded companies and thereby manage the risk of such investments for the investors collectively could qualify as regulated public collective investment scheme, provided their offerings are public as defined *inter alia* in the Prospectuses Act. This requires a licence as a collective investment scheme.

2.4 The Payments Services Act

Any transfer of funds through a Crowdfunding platform or payment operations executed by a Crowdfunding platform will generally constitute money remittance services within the meaning of the Belgian Payments Services Act of 21 December 2009 (sections 4(1°), (2°) and (12°) of that Act).

These activities are normally restricted to banks and payment establishments licensed by the Belgian National Bank that have been granted the status of Payment Institutions (section 6 of the Act).

If the Crowdfunding platform falls within the scope of the Payment Services Act, i.e. if the money transits through the Crowdfunding platform's bank accounts, it will have to apply for a licence from the Belgian National Bank.

To avoid this burden and expense, platforms usually rely on a third party, an external provider or partner, for processing payments rather than acting as a payment intermediary between the investors and the company seeking funding.

Most Belgian platforms even avoid the cost of a payment services provider by having the funds wired direct by the investor into the funded company's account.

Platform promoters will probably not be able to rely on the "sales agent" exemption provided for in section 4(1°) of schedule II to the Payment Services Act (*"payment transactions from the payer to the payee through a commercial agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee"*), as the chance is that, in the absence of steady relations with the funded company, they will be deemed to be acting as a broker rather than an agent.

2.5 Prospectus Requirements

Under the Prospectuses Act (Act of 16 June 2006 on public offers of investment instruments) the following operations do not qualify as a public offer of "investment instruments" (see below for the difference between financial instruments and the broader category of investment instruments); they are offers:

- for a total consideration of less than EUR 100,000;
- directed at fewer than 150 natural or legal persons per Member State (recently increased from 100 persons), other than qualified investors;
- where the total consideration per investor and per offer is more than EUR 100,000 (recently increased from EUR 50,000), calculated over a period of 12 months.

These last two thresholds were very recently increased by the Act of 17 July 2013, which came into force on 16 August 2013.

Most Belgian Crowdfunding platforms operate within the prospectus exemptions. One platform issues a prospectus; it is chiefly a vehicle for professional investors, where the crowd invests through Notes alongside those investors.



2.6 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- The Act on Market Practices and Consumer Protection
- Money Laundering Provisions
- The Privacy Act
- The Consumer Credit Act

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Belgium

3.1 3.1 Status of AIFMD implementation

All the EU member states must implement the European Alternative Investment Fund Managers Directive (“AIFMD”) by 22 July 2013. Belgium has not met this deadline. In Belgium, the law has not yet been implemented and no bill has been promulgated so far.

However, the FSMA has published Q&As (*“Questions and answers on the transitional period provided for by Directive 2011/61/EU and on the Belgian national provisions for transposing this directive”*, schedule to the FSMA’s communication of 2 July 2013) aimed at providing guidance to businesses on application of the AIFMD during the transitional period and until the directive’s transposition into national law.

3.2 Definition of an alternative investment fund (“AIF”)

Until the directive has been transposed, reference has to be made to the definitions used by the directive. According to the AIFMD, an AIF is: *“any collective investment undertaking, including investment compartments thereof, which raises capital from a number of investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors and which does not require authorization pursuant to the UCITS Directive.”* An AIFM is an *“entity that provides, at a minimum, portfolio management and risk management services to one or more AIFs as its regular business irrespective of where the AIFs are located or what legal form the AIFM takes.”*

3.2.1. Crowdfunding platform

As a general rule, a Crowdfunding platform plays the mere role of an intermediary between the investors and the funded company. Therefore, generally, a Crowdfunding platform will not qualify as an AIF, and nor will the operator of the Crowdfunding platform qualify as an AIF Manager.

Sometimes, however, the Crowdfunding platform does more than just putting investors and the project operator in contact with each other and actively manages the investment. This is the case where the platform uses an investment vehicle or holding company.

Although holding companies are excluded from the scope of the AIFMD, this concept will be interpreted narrowly. Platforms using special purpose vehicles to manage the investment on a discretionary basis could fall under the AIFMD. Hence, it is likely that platform operators will provide risk and portfolio management services to those entities, and will be deemed AIF Managers.

At this stage, and in the absence of the directive's transposition, which is only expected in 2014, it is not possible to properly assess the impact of the AIFMD on Belgian platforms, or draw a valid distinction between operating companies and project companies (which are more prone to regulation).

Crowdfunding platform operators that might fall under the AIFM regulation will probably benefit from the "lighter regime" (pursuant to the system of *de minimis* thresholds contained in article 3 of the directive).

4 Conclusion

In the current state of play, equity Crowdfunding platforms may require to be licensed as providers of investment services, which explains why no such platform is still operating in Belgium. A clearer interpretation of the nature of certain investment services would be welcome, such as a definition of private placement. An open, flexible interpretation, as is the case for the restriction on collecting public savings, would even be more welcome. Failing such, there seems to be no place for unlicensed equity Crowdfunding in Belgium.

Therefore most Crowdfunding platforms catering for the business community operate under the lending model. These platforms' offerings do not exceed EUR 100,000 per annum for the venture being financed, to avoid application of the Prospectuses Act. Only one Crowdfunding platform has opted for the prospectus regime. It is mainly driven by professional venture capitalists. The crowd plays only a limited support role.

A few, very limited political initiatives have attempted to adapt the current regulations to the needs of Crowdfunding. They have had almost no effect, as the framework set out by the existing EU financial directives limits their leverage. Only an initiative at EU level would really open up the Crowdfunding market and level the playing field amongst EU member states. In the meantime, one can but hope for a legislative initiative inspired by the recent Italian equity Crowdfunding regulations, which open the market up for equity Crowdfunding platforms and allow start-ups to sell shares online, up to a total value of EUR 5 million.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the author:

Alexis Wochenmarkt
Partner
alexis.wochenmarkt@thales.be



Thales Attorneys
Place Poelaert 6
1000 Brussels
Belgium

Tel +32 2 533 04 50
www.thales.be





BULGARIA



1 Current Market of Crowdfunding platforms in Bulgaria

Further to the latest surveys of both the European Central Bank and the domestic industry statistics the Bulgarian start-up SMEs rely mostly on bank loans, including short-term bank credits or overdraft facilities. However, there are many companies which are unable to answer the formal requirements of the credit institutions and, therefore, rely on their families and acquaintances to invest and support their businesses. As an alternative to the latter business-angels investors appeared in Bulgaria in the recent years, The Bulgarian Business Angels Network has been established in 2007, aiming to support innovative SMEs, mostly in the IT sector.

In view of the above, although the benefits which crowd-funding provides to start-up companies and commercial projects and proposes to formalize the financial sector services and to make it accessible to the SMEs, there are only few web-platforms for crowd-funding and the services they provide are vaguely known to the Bulgarian business society.

Due to the fact that the figure of Crowdfunding is unfamiliar in the local business environment and the lack of information about the different types of Crowdfunding schemes, we have conducted a detailed survey in the Bulgarian online business and information platforms, such as www.investor.bg and www.computerworld.bg. We have also contacted several official state bodies – The Bulgarian National Bank, The Financial Supervision Commission, and The Bulgarian Chamber of Commerce and Industry.

In summary, according to the information available, the few known Crowdfunding web-platforms promote limited number of projects and the financial means, accumulated within the time framework of the respective projects are insignificant by comparison with the resources gathered by the Crowdfunding platforms popular abroad.

The projects that we have examined cover the structure of Equity model and the Donation/Reward Model.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

According to the information available, there is one Crowdfunding web-platform in Bulgaria which promotes projects covering the Equity Model – www.bgkoopeartiv.com, as follows:

Investors shall pay their contributions to an escrow bank account managed by the operator of the web-platform. In general, the timeframe for an investment project is set to at least 40 days. In case the project is accomplished successfully and within the set timeframe representative of the operator of the platform, the investors and the beneficiary of the investment should sign sale-share agreement before a notary public, aiming to settle the transfer of the invested amount to shares of a

company owned by the beneficiary. The latter shall pay to the operator fee amounting to 6 % of the contribution for the relevant services provided.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

According to the information available, the few known Crowdfunding web-platforms in Bulgaria do not promote projects which cover the Lending Model.

1.3 The Donations or Reward Model (individuals provide money to a company or project for benevolent reason or for a non-monetary reward)

According to the information available, there is one Crowdfunding web-platform in Bulgaria which promotes projects covering the Donation Model – www.zaedno.bg, as follows:

Investors shall pay their contributions for a particular cause online to a bank account through the web-platform. Donations are subject to tax incentives under the Corporate Taxation Act and The Act on Income Taxation of Natural Persons.

2 Current Regulation of Crowdfunding platforms in Bulgaria

Upon investigation of the applicable Bulgarian legislation and the unofficial information obtained by the competent state authorities in this regard, we confirm that explicit regulations in the field of Crowdfunding financing have not been adopted yet.

Notwithstanding the above, upon development of this institute in Bulgaria, the following legal framework could be applied in future to the already existing types of Crowdfunding:

2.1 Law on Credit Institutions & Law on Payment Services and Payment Systems

In general, pursuant to Art. 2 and 3 of the Law on Credit Institutions a legal entity is treated as a credit or a financial institution in any case it provides to the public financial services including payment services within the meaning of the Law on Payment Services and Payment Systems.

Financial institutions which are not subject to license under another special legal act are required to register in the Financial Institutions Register maintained by the Bulgarian National Bank (BNB) – the institution, supervising their activity. BNB shall be also competent to exercise control to payment service providers as defined in the Law on Payment Services and Payment Systems.

In summary, notwithstanding the type of the Crowdfunding platform, the operator of the platform shall be required to meet the prerequisites of at least one of the abovementioned legal acts.

2.2 Public Offering of Securities Act & Markets in Financial Instruments Act

2.2.1 Equity Model

In case the Crowdfunding platform offers an Equity Model it could fall within the legal framework of the Public Offering of Securities Act or the Markets in Financial Instruments Act.



Legal entities providing public offering of securities shall be required to register as a public joint-stock company and to comply with the requirements for those companies under the Law.

These rules do not apply where the total consideration of the offered securities is less than the BGN equivalent to EUR 100.000, which limit shall be calculated within a time period of one year.

Legal entities facilitating public offering of securities or investment products could have been required to register as an investment intermediary under the Markets in Financial Instruments Act.

The Financial Supervision Commission is responsible to supervise the public offering of securities and to exercise controlling activities in order to prevent and terminate legal violations in view to ensure protection of the interests of investors.

2.3 Possible additional regulations

Other applicable laws related to the activities of the Crowdfunding platforms might be:

- the Commerce Act,
- the Law on Measures against Money Laundering and
- the Currency Act, in regard to the bank transfers regulations, as well as the different lending models, including between related parties.

3 Status of AIFMD implementation

The European Alternative Investment Fund Managers Directive ("AIFMD") has not been implemented in the Bulgarian legislation so far. Nevertheless, pursuant to the draft of the respective Law on the activities of collective investment schemes and other collective investment undertakings, the Crowdfunding financing shall not fall within the scope of its application. It shall apply to closed-end investment companies, as far as the special investment purposes companies are excluded of the scope of application of the Directive.

4 Conclusion

As long as the Crowdfunding platforms in Bulgaria are not subject to a special legislative control at present, we consider that in the course of future development of the financial market in Bulgaria a specific legislative approach should be applied.



5 Contact details of the authors:

Nina Boteva
Managing partner
nboteva@bklegal.com



Boteva & Kantutis Law Office
2, Nikolay Pavlovich Str.
1142 Sofia
Bulgaria

Tel.: +35 929 897 290
www.bklegal.com

BOTEVA & KANTUTIS

Anna Dodova
Partner
adodova@bklegal.com



Veneta Hristova
Associate
office@bklegal.com



CANADA



1 Current market of Crowdfunding platforms in Canada

Crowdfunding is divided into Non-Equity and Equity Crowdfunding platforms in Canada¹. Non-Equity platforms, as its name implies, do not involve the issuance of securities and are not regulated by Canadian securities laws. In contrast, equity Crowdfunding platforms involve the issuance of securities and consist of peer-to-peer (**P2P**) lending platforms and equity platforms.

1.1.1 Non-Equity Crowdfunding

There are three types of Non-Equity Crowdfunding Models that operate on Crowdfunding platforms in Canada, the Donation Model, the Rewards Model and the Pre-Purchase Model. A directory of various Non-Equity Crowdfunding platforms is publicly available on the website of the National Crowdfunding Association of Canada.²

1.1.2 Donation Model

The Donation Model is where an individual or entity donates or makes a financial contribution to a project or cause without any expectation of receiving a financial return on that contribution. An individual is motivated to make a donation based on their personal desire to support a project or campaign that is in some way meaningful or important to them. The Donation Model has its roots in philanthropy and is commonly used by on-line charities.

1.1.3 Reward or Perk Model

The Reward Model is where an individual or entity makes a financial contribution to a project or cause in return for a reward or perk. The types of rewards or perks offered by a project sponsor or entrepreneur vary considerably and are often quite imaginative and interesting and may not necessarily involve something tangible. For example, a film project could reward contributors with special recognition in the film credits or provide branded merchandise depending on the amount they contribute.

1.1.4 Pre-Purchase Model

The Pre-Purchase Model is where an individual or entity provides an up-front payment in exchange for a pre-order of a product. This model provides validation of a need or want for a product by providing a project sponsor or entrepreneur with up-front capital often at a discount to the anticipated retail price.

¹ The information in this note is current as of October 14, 2013.

² See <http://www.ncfacanada.org/canadian-crowdfunding-directory>.

1.2 Equity Crowdfunding

Equity Crowdfunding in Canada consists of P2P Lending and Equity Crowdfunding platforms.

1.2.1 Peer-to-Peer Lending Model

P2P lending involves matching borrowers with lenders where individuals or entities lend money to an individual, company or project in return for the repayment of the principal amount of the loan plus interest on their original investment. P2P lending is considered a 'security' under Canadian securities law, therefore, lenders are considered to be investors. Accordingly, any P2P portal would be a regulated entity under applicable Canadian securities law.

Canadian securities laws do not have an express prospectus or registration exemption to permit the operation of an on-line P2P lending platform. Therefore, in order for a P2P lending platform to operate in Canada, it would have to obtain exemptive relief from the prospectus and registration requirements from the various Canadian securities regulatory authorities as one company did in 2009.³ This company operated a P2P lending platform for accredited investors only. This company has since changed its business model and is no longer engaged in P2P lending. We are not aware of any other P2P lending platform operating in Canada.

1.2.2 Equity Crowdfunding Models

1.2.2.1 Regulation of securities in Canada

Canada consists of 10 provinces and three territories and the regulation of securities is within the jurisdiction of the provinces and territories and not the federal government of Canada as a matter of constitutional law. Therefore, Canada does not presently have a national securities regulator or any national securities legislation, although plans are in place to create a national securities regulatory authority.⁴ The Ontario Securities Commission (the **OSC**) is the largest securities commission in Canada while other significant provincial securities regulators are the British Columbia Securities Commission (**BCSC**), the Alberta Securities Commission and the Autorité des marchés financiers (Québec).

Although there are 13 jurisdictions in Canada, the various provincial and territorial securities regulators work together through an umbrella organization called the Canadian Securities Administrators (**CSA**). Through the CSA, Canada's provincial and territorial securities regulators promulgate national and multilateral instruments, guidelines, notices and other regulatory pronouncements in order to improve, coordinate and harmonize the regulation of the capital

³ See the exemptive relief order provided to Communitylend Inc. on the website of the Ontario Securities Commission at: http://www.osc.gov.on.ca/en/SecuritiesLaw_ord_20090911_215_communitylend.jsp.

⁴ On September 19, 2013, the Canadian Minister of Finance announced that the federal government has agreed in principle with the provinces of British Columbia and Ontario to move towards establishing a cooperative capital markets regulatory system. The proposed regulator will be a common regulator that will administer a single set of regulations designed to protect investors, support efficient capital markets and manage systemic risk. Although the other provinces and territories are not parties to the agreement in principle, the Canadian Minister of Finance has extended an invitation to all provinces and territories to participate.

markets in Canada. The CSA has published national Instrument involving prospectus exemptions that includes the offering memorandum (**OM**) exemption (the **OM exemption**)⁵ which is used by registered dealers to sell securities on the internet to the public which is discussed below.

1.2.2.2 Regulation of Equity Crowdfunding in Canada

There is no express Equity Crowdfunding prospectus and registration exemption in Canada but two proposed frameworks have been published by the Provinces of Ontario and Saskatchewan and are receiving serious consideration. However, some registered dealers in Canada have established websites where they sell securities to the public under the OM exemption. The OM exemption is available in all jurisdictions in Canada, except Ontario, and has been in place for many years.⁶ Some CSA members believe this prospectus exemption provides an existing securities framework for Equity Crowdfunding and existing registered dealers are taking advantage of it.⁷

The CSA members are still considering whether Equity Crowdfunding should occur under the OM exemption or a specific Equity Crowdfunding exemption as proposed by Ontario and Saskatchewan. Regardless, if a foreign entity desires to engage in Equity Crowdfunding today, it could do so in all jurisdictions in Canada except Ontario under the OM exemption as discussed below.

2 Current Regulation of Crowdfunding Platforms in Canada

2.1 Registration requirement for platforms

2.1.1 Across Canada – exempt market dealers

Offering securities for sale on the internet triggers registration under Canadian securities law. Crowdfunded offerings under the OM exemption must be conducted by a registered dealer under Canadian securities law. In Canada, there is a category of dealer called an 'exempt market dealer' (an EMD) that can act as a registered dealer in connection with Crowdfunded offering.⁸

An EMD is required to satisfy a number of regulatory obligations and requirements under Canadian securities law including its 'know your product' obligation, 'know your client' obligation and suitability obligation (which requires an EMD to ensure that an investment is a suitable investment for each investor). An EMD can act as an intermediary in any type of prospectus-exempt offering in

⁵ See section 2.9 of National Instrument 45-106 – *Prospectus and Registration Exemptions*.

⁶ For various policy reasons, Ontario has not adopted the OM exemption; however, it is currently under review.

⁷ Although some EMDs are also selling securities over the internet on their websites to accredited investors, (e.g., wealthy individuals and large institutional and government investors), many do not view the accredited investor prospectus exemption which is available across Canada as true Equity Crowdfunding since it does not involve selling securities to the public. According to OSC statistics, accredited investors only comprise approximately 4% of the Ontario and Canadian population.

⁸ Although an 'investment dealer' under Canadian securities law can also sell securities on the internet under the OM exemption, we are not aware of any such investment dealers who are engaged in such activities.



Canada where it is registered provided that the prospectus exemption relied upon is available in that jurisdiction.

2.1.2 Ontario's Equity Crowdfunding proposal

In Ontario, the OSC has published an Equity Crowdfunding framework in December 2012 (the **Ontario Proposal**).^{9, 10} The OSC Proposal states that an Equity Crowdfunding platform operating in Ontario would have to register in the appropriate category of dealer or advisor category since the activities of platforms will generally be considered registerable trading or advising activity under Ontario securities law. The Ontario Proposal does not set out the registration requirements for a platform; however, it will likely be a type of 'restricted dealer' which means it will not be subject to all of the registration requirements of an EMD. For example, it is unlikely that a portal will be required to assess whether a Crowdfunded investment is suitable for an investor which is required by an EMD as a matter of law.

2.1.3 Saskatchewan's Equity Crowdfunding proposal

In Saskatchewan, the Financial and Consumer Affairs Authority (the FCAA), the Saskatchewan securities regulatory authority, published a proposed Equity Crowdfunding framework for start-ups in July 2013¹¹ and followed up with a proposed Equity Crowdfunding prospectus exemption in October 2013.¹² The FCAA does not require an Equity Crowdfunding platform to be registered as a dealer or as an adviser under Saskatchewan securities law; however, it does require the platform operator and each promoter, director, officer and control person of the platform operator to file certain application forms 30 days before engaging in Crowdfunded offerings.

In order to rely on the Equity Crowdfunding exemption described in the Saskatchewan Proposal, the platform must ensure that:

1. it makes an Important Risk Warnings document and the offering document separately available to investors electronically online;
2. it does not allow the investment until the investor confirms online that they have read and understood the offering document and the Important Risk Warnings;
3. it does not release any funds until the minimum offering amount has been raised and until that time all funds received for the offering are held in trust for investors;

⁹ See OSC Staff Consultation Paper 45-710 *Considerations for New Capital Raising Prospectus Exemptions*.

¹⁰ In August 2013, the OSC published a progress report where it summarized its work and the public comments it received and confirmed its interest in continuing to develop an Equity Crowdfunding framework that seeks to balance investor protection without imposing excessive regulatory burdens on issuers and platforms.

¹¹ See "Saskatchewan Begins Preliminary Exploration of Equity Crowdfunding" on the FCAA's website at: <http://www.gov.sk.ca/news?newsId=e8941005-2be7-4c70-a443-b48e78b8edd0>.

¹² General Order 42-925 Saskatchewan Equity Crowdfunding Exemption.



4. when the offering is closed, the platform provides the issuer with the details of the investor (e.g., name address, e-mail etc.) within 15 days of the closing of the offering; and
5. issuers and investors have an address in Saskatchewan.

2.2 Payment services regulation

A platform that is a registered as an EMD would be permitted to receive or hold investor funds in trust. This is what EMDs presently do when they engage in any type of private placement in Canada including a Crowdfunded offering under the OM exemption.

It is not clear whether a platform that may be registered as restricted dealer would also be permitted to receive or hold funds under the Ontario Proposal, however, it is expressly contemplated under the Saskatchewan Proposal.

2.3 Prospectus requirements

This section examines the OM exemption and the proposed Equity Crowdfunding prospectus exemptions being considered by Ontario and Saskatchewan.

2.3.1 OM exemption – available across Canada except Ontario

There are two models of the OM exemption in Canada; the ‘British Columbia model’ and the ‘Alberta model’. The British Columbia model is followed by the provinces of British Columbia, New Brunswick, Nova Scotia and Newfoundland and Labrador, while the Alberta model is followed by the provinces of Alberta, Manitoba, Prince Edward Island, Québec, Saskatchewan and the Northwest Territories, Nunavut and the Yukon.¹³

Under both models, a purchaser purchases a security as principal and at the same time, or before the purchaser signs the agreement to purchase a security, the issuer: (a) delivers a prescribed form of OM to the purchaser; (b) obtains a signed risk acknowledgement form from the purchaser; and (c) satisfies such other requirements as discussed below. Under both models, issuers can sell securities to the public with no limit on the amount of capital that can be raised by an issuer or invested by an investor, except the Alberta model only permits investors to invest up to \$10,000 unless they are an “eligible investor”¹⁴ and if so, then there is no investment limit.

¹³ Ontario is presently considering adopting the Alberta model of the OM exemption but considering additional investor protection measures.

¹⁴ An “eligible investor” means, among other things, a person whose: (a) net assets, alone or with a spouse, in the case of an individual, exceed \$400,000, (b) net income before taxes exceeded \$75,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year, or net income before taxes, alone or (c) with a spouse, in the case of an individual, exceeded \$125,000 in each of the two most recent calendar years and who reasonably expects to exceed that income level in the current calendar year.

Generally, reliance on the OM exemption is subject to the following requirements:

- *Commission and finder's fee*: no commission or finder's fee may be paid to any person, other than a registered dealer, in connection with a distribution to a purchaser in the Northwest Territories, Nunavut, Saskatchewan and Yukon. It is permitted in the other jurisdictions.
- *Prescribed form of OM*: an OM must be in compliance with the prescribed form requirements, as set out in Form 45-106 F2 - *Offering Memorandum for Non-Qualifying Issuers*, which describes the form requirements for private issuers. There is a separate form for public issuers.
- *Audited financial statements* – issuer are required to include audited financial statements and interim financial statements for the most recently completed interim period that ended more than 60 days before the date of the OM, subject to a number of requirements.¹⁵
- *Cancellation right and holding funds in trust*: an OM must provide the purchaser with a contractual right to cancel the agreement to purchase the security if the securities legislation where the purchaser is resident does not provide a comparable right by delivering a notice to the issuer not later than midnight on the second business day after the purchaser signs the agreement to purchase the security. Accordingly, the issuer must: (a) hold in trust all consideration received from the purchaser in connection with a distribution of a security until midnight on the second business day after the purchaser signs the agreement to purchase the security; and (b) return all consideration to the purchaser promptly if the purchaser exercises the right to cancel the agreement to purchase the security.
- *Statutory rights of action*: the OM must contain a prescribed contractual right of action against the issuer for rescission or damages if the securities legislation where the purchaser is resident does not provide a statutory right of action in the event of a misrepresentation in an OM delivered to a purchaser.
- *Certificate*: the OM must contain a certificate page that states the OM does not contain a misrepresentation which must be signed by individuals holding certain titles within an issuer, which varies depending on the type of legal entity that is offering the securities. This certificate must be true at the date the certificate is signed and delivered to a purchaser. If a certificate ceases to be true after it is delivered to a purchaser, the issuer cannot accept an agreement to purchase the security from a purchaser unless: (a) the purchaser receives an updated OM; (b) the updated OM contains a newly dated and signed certificate; and (c) the purchaser re-signs the agreement to purchase the security.

¹⁵ On December 20, 2012, the CSA members (other than British Columbia and Ontario) published Multilateral CSA Notice 45-311 Exemptions from Certain Financial Statement-Related Requirements in the Offering Memorandum Exemption to Facilitate Access to Capital by Small Businesses. Each CSA member (other than British Columbia and Ontario) issued a harmonized interim local order (the **Order**) that provides an exemption from certain financial requirements set out in the OM exemption. The Order remains in force until December 14, 2014. The Order provides relief from the audited financial statement requirement and the requirement for issuers to prepare financial statements using Canadian GAAP applicable to publicly accountable enterprises provided that: (a) the issuer and related issuers raise no more than \$500,000; (b) no investor invests more than \$2,000 in any 12-month period; (c) the issuer is not a reporting issuer, investment fund, mortgage investment entity or real estate issuer; (d) the issuer does not distribute complex securities; and (e) the OM contains a bold warning on the front page.

In February 2013, the BCSC published a Notice and Request for comment on National Instrument 45-106 *Prospectus and Registration Exemptions Proposed Prospectus Exemption to Assist Capital Raising by Small Businesses* (the **BC Proposal**). The BC Proposal is the same as the Order except that it requires an issuer to identify the use of the exemption in a report of trade and it is not yet legal. Unlike the Order it is only a request for comment which comment period has closed and there has been no further update by the BCSC on this matter. The BC Proposal can be found on the BCSC's website at: http://www.bscs.bc.ca/policy.aspx?id=16540_

- *Risk acknowledgement form*: a risk acknowledgement form must be in the required form and an issuer relying on it must retain the signed risk acknowledgment for eight years after the distribution.
- *Filing the OM and any update OM*: the issuer must file a copy of an OM delivered to a purchaser and any update of a previously filed OM with the securities regulatory authority on or before the 10th day after the distribution of the OM or updated OM.

2.3.2 The Ontario Proposal

The key elements of the Ontario Proposal are set out below.

- *Qualification criteria* - the issuer, its parent (if applicable) and its principal operating subsidiary (if applicable) must be incorporated or organized under Canadian federal laws or the laws of a Canadian jurisdiction and the issuer must have its head office located in Canada. It applies to private and public companies except investment funds.
- *Limit on offering size* – the issuer cannot raise more than \$1.5 million in any 12-month period.
- *Limit on type of security* – the only securities that can be distributed under this exemption are common shares, non-convertible preferred shares, non-convertible debt securities that are linked only to a fixed or floating interest rate and securities convertible into common shares or non-convertible preferred shares.
- *Investment limits* – an investor cannot invest more than \$2,500 in a single investment or more than \$10,000 in total under this exemption in a calendar year.
- *Limits on advertising* – the issuer is not permitted to advertise an investment except through the funding portal or on the issuer's website. However, the issuer would be able to use social media to direct investors to the funding portal or the issuer's website.
- *Type of offering document* - an investor must be provided an 'information statement' (a type of offering document with prescribed disclosure) at the time of distribution consisting of: (a) *financing facts* – basic information about the offering; (b) *issuer facts* – basic information about the issuer; and (c) *registration facts* – basic information about the registrant or portal. The OSC states that the information statement is intended to provide more stream-lined than the disclosure under the OM exemption and would be akin to a summary in a long-form prospectus.
- *Risk factor disclosure* - the information statement must include a discussion of the principal risks facing the issuer's business.
- *Risk acknowledgement form* - a purchaser must sign a stand-alone risk acknowledgement form where they confirm they: (a) fall within the investment limitations under the exemption; (b) understand they can lose all their money; (c) can bear the loss of their entire investment; and (d) understand the illiquid nature of the investment.
- *Financial statements* – an issuer's financial statements: (a) must be audited if the issuer proposes to raise at least \$500,000 or if the issuer is a public company; and (b) may be unaudited if the issuer proposes to raise less than \$500,000 and is not a public company; only management-certified financial statements would be required in such circumstances.
- *Rights of action* – investors have a statutory right of action against an issuer for a misrepresentation in the information statement.
- *Report of trade* – it is contemplated that a report of trade will be required to be filed by an issuer with the OSC within 10 days of the trade. It is not clear whether a filing fee will be required to be paid at this time.
- *Resale restrictions* – securities distributed under this exemption are subject to a restricted resale period. The securities will not be free-trading shares where the issuer is not a public company, unless they can be sold under another prospectus exemption.
- *Ongoing disclosure requirement* – issuers must provide its securityholders with annual financial statements within 120 days from its fiscal year end.

- *Books and record requirement* - issuers must maintain books and records that are available for inspection by purchasers and OSC staff.

2.3.3 The Saskatchewan Proposal

On October 7, 2013, the FCAA published the Saskatchewan Proposal¹⁶ and has requested public feedback by November 6, 2013.¹⁷

The key features of the Saskatchewan Proposal are set out below.

- *Saskatchewan investors only* – the exemption is only available to investors who have an address in Saskatchewan.
- *Investor investment limits* - investors can only purchase \$1,500 per offering with no annual investment limit.
- *Acknowledgement of risk* - investors must confirm online that they have read and understood a prescribed form of document called *Important Risk Warnings*.
- *Rights of action* - subject to certain limitation periods, investors have a right to sue for a misrepresentation in the issuer's advertising or sales materials or if a verbal statement was made in connection with the investment that contained a misrepresentation. Investors also have a right to cancel the subscription agreement and recover the purchase price if the investment is sold in breach of a decision of the FCAA or the Saskatchewan Securities Act.
- *Saskatchewan issuers only* - the exemption is only available to issuers who have an address in Saskatchewan.
- *Type of issuer* - any type of issuer can use the exemption except a public company or an investment fund.
- *Type of securities* - any type of security can be issued except derivatives. The trade can only involve a trade by the issuer in its own securities facilitated by the portal.
- *Form filing* - any issuer must file Form GO45-925F1 *Issuer Information* 10 days prior to beginning to trade.
- *Maximum offering size* - \$150,000.
- *Minimum offering size* - the minimum offering size must be set out in the offering document which must equal the amount needed to carry out the purpose for which the funds are sought. The minimum offering size may be reduced by any other amount available for the purpose set out in the offering document, as long as the offering document states that these other funds are unconditionally available to the issuer.
- *Offering period* – the offering period shall not exceed six months.
- *Annual limit* - the issuer and its promoters, directors, officers and control persons cannot use the exemption more than two times per calendar year.
- *Offering document* - the issuer must use an offering document following Form GO45-925F3 *Offering Document* to be made available to investors through the portal and file the offering document 10 business days prior to beginning to trade.
- *No other concurrent offering* – there can be no other concurrent offering by the issuer or other issuer for the same project
- *Background checks* – the FCAA will undertake background checks on individuals involved with the offering who must submit Form GO45-925F2 *Individual Information Form*.

¹⁶ General Order 42-925 Saskatchewan Equity Crowdfunding Exemption.

¹⁷ The stated purpose of the Saskatchewan Proposal is to help bridge the funding gap for start-ups and entrepreneurs while adequately protecting investors. If implemented, the FCAA stated the Saskatchewan Proposal would have a three-year sunset clause when it expires.

- *No payment of commissions* – no commission or other amounts can be paid to the issuer or its promoters, directors, officers, control persons, employees or agents with respect to the trade.
- *Report of trade and fees* - the issuer must file a report of trade in Form GO45-925F4 *Report of Trades* within 30 days after the offering closes. There are no filing fees payable to the FCAA.
- *Resale restrictions* – securities can only be resold under a prospectus exemption unless the issuer becomes a reporting issuer and if so, then subject to certain conditions.
- *Ongoing disclosure requirement* – there are no ongoing disclosure requirements except issuer are required to disclose how investors will be updated in their offering document.
- *All trades must be through portal* - in order to rely on the exemption, all trades must be carried out through the portal and payment for the securities must be made through the portal.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Canada

Canada is not required to adopt the AIFMD since it is not part of the EU. However, to the extent that a Canadian-based portfolio advisor markets AIFs in the EEA, manages or sub-advises EEA domiciled AIFs, or is outside the safe harbour for “reverse solicitation” in a jurisdiction, it may need to comply with the local rules and requirements.

4 Conclusion

Canada currently permits Equity Crowdfunding under the OM exemption in all jurisdictions in Canada, except Ontario where it is presently unavailable, provided that it is undertaken by registered dealers such as an EMD. EMDs sell securities in the exempt market (*i.e.*, exempt from the prospectus requirement) and are much easier to become registered than a full investment dealer.

Both Ontario and Saskatchewan are considering adopting a specific Equity Crowdfunding framework. It is believed that Ontario is waiting for the United States to come out with its draft rules and regulations before finalizing any framework in Ontario, if at all, while many anticipate Saskatchewan will likely adopt its framework by the end of 2013.

The tension in Canada is that some CSA members believe the OM exemption should be used as our only Canada-wide Equity Crowdfunding exemption, while Ontario believes there should be a less burdensome framework. This is being debated among the CSA members. Saskatchewan is looking at the OM exemption, as are other CSA members as the preferred framework, but believes it needs a different approach for start-ups with its Saskatchewan Proposal.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the author:

Brian Koscak
Partner
bkoscak@casselsbrock.com



Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto M5H 3C2
Ontario, Canada

Tel +1 416 860 2955
www.casselsbrock.com





CROATIA



1 Current Market of Crowdfunding platforms in Croatia

In Croatia, under publicly available information, it appears that there are still no (recognizable) local Crowdfunding platforms in operation at this point. One platform of Donations or Rewards type is in development stage.

1.1 The Equity Model

According to this model, individuals make investments in return for a share in the profits or revenue generated by the company/project. While it is generally possible to operate this model in Croatia, currently there appear to be no locally established and active Crowdfunding platforms of this type.

1.2 The Lending Model

Under this model, individuals lend money to a company or project in return for repayment of the loan and interest on their investment. While it is generally possible to operate this model in Croatia, currently there appear to be no locally established and active Crowdfunding platforms of this type.

1.3 The Donations or Rewards Model

Under the Donations Model, individuals provide money for financing social, charity or creative projects or companies and no financial investment or return is involved. Investors fund projects or companies and either get no return at all or only receive non-monetary rewards (e.g. tickets, CDs or rewards of a symbolic value).

In 2013, information of a local Crowdfunding platform of this type emerged, but it appears that the platform is still in preparatory phase and no details of the possibility of actually using the platform are available at this point. It is described that the platform will initially only be used to finance humanitarian and socially beneficial projects performed by NGOs, while the possibility and extent of financial support for individuals or companies is yet to be decided on.

2 Current Regulation of Crowdfunding platforms in Croatia

2.1 Licence under the Capital Market Act and Open-Ended Investment Funds Act

2.1.1 Equity Model

Under the Croatian Capital Market Act, anyone intending to provide “investment services” and conduct “investment activities” in Croatia requires a written licence from the domestic Financial Services Supervisory Authority (*Hrvatska agencija za nadzor financijskih usluga* – “HANFA”), or from Croatian National Bank (“CNB”) if a credit institution is at hand.

The "investment services and activities" are defined as including (*inter alia*) the brokering of business involving the purchase and sale of financial instruments (investment brokering), the purchase and sale of financial instruments in the name of and for the account of others (contract brokering), the placement of financial instruments without commitment to take up those instruments (placement of financial instruments), portfolio management, investment counselling, safeguarding and administering investments (including custodial services).

"Financial instruments" within the meaning of the Capital Market Act notably include securities, units in collective investment funds, money market instruments options, futures, swaps, forward rate agreements and other derivative instruments linked to securities, currency, interest rates or returns.

"Securities" are, *inter alia*, (a) company shares and other equivalent securities representing shares in the capital or in membership rights within companies, and share deposit certificates; (b) bonds and other forms of securitized debt, including certificates of deposit relating to such securities; (c) any other security normally negotiated which permits the purchase or sale of securities described in the preceding paragraphs; d) any other security based on which a cash payment may be made as determined with reference to securities, currency, interest rates, returns, commodities, indices or measures.

On the other hand, depending on the structure of particular platform, there is the possibility that the fund seeker and/or the platform operator could in fact be considered as operating an open-ended public collective investment fund (scheme). This interpretation could arise e.g. due to a non-standard profit-sharing arrangement (as opposed to a classic company/shareholder relationship), and taking into account that the "investment fund" can refer to a body corporate or a collection of assets and that typically the investors would not have day-to-day oversight of management decisions. In such case, the applicable rules mandate both obtaining requisite approval from HANFA and registering with the relevant registry.

To summarize, where an online Crowdfunding platform facilitates the offering of financial instruments (notably securities or units in collective investment funds) and/or performs other regulated activities (investment services/activities as described above), it appears that the operator of the platform provides investment services or operates an investment fund within the meaning of the Croatian Capital Market Act and Open-Ended Investment Funds Act. Therefore, as a general rule, a license by HANFA and/or the Croatian National Bank is required, plus relevant registration in a investment fund scenario.

However, it should be noted that due to lack of Crowdfunding activity in Croatia until this time, no settled practice on licensing issues has yet been developed. The Croatian regulators have apparently not made any public announcements on the matters at hand and there is currently no available information on whether the Croatian legislation will change in a way where Crowdfunding would be separately regulated.

2.1.2 Lending Model

To the extent that the platform would entail dealing in transferable debentures (as "securities" in terms of Capital Market Act), it is likely that the appropriate license would have to be obtained from HANFA and/or CNB, similarly as with the Equity Model. On the other hand, if the loans would not be



transferable nor be structured in a way qualifying as securities in another way, it appears that no such license would be necessary.

Furthermore, if the platform permits borrowers to be individuals (acting outside commercial activity), the Croatian Consumer Credit Act would generally apply and a proper license from the Ministry of Finance or CNB will generally be required. There will also be implications for the form and content of the lending agreement.

However, it should again be emphasized that no (settled) practice has yet been established by Croatian authorities in respect to regulation of any kind of Crowdfunding.

2.1.3 Donations or Rewards Model

Depending on the platform structure, there are good reasons to state that these kinds of investments do not qualify as investment services or activities. Therefore, the platform operating this model should fall outside of Croatian financial services regulation.

2.2 Licence under the Payment Services Act

The transmission of funds between the investor and the crowd funded business via the Crowdfunding platform may involve the platform operator providing "money remittance" services as defined under the Croatian Payment Services Act ("PSA"). Money remittance services generally require authorization from CNB

However, "money remittance" services under PSA do not extend to payments made by "commercial agents" authorized to negotiate or conclude contracts on behalf of the payer and payee. Therefore, depending on the overall structure, the platform operators would likely be able to invoke this exception and avoid the licensing obligation.

2.3 Prospectus requirements

General rule

Under the Capital Market Act, a prospectus is mandated for a public offering of securities on the territory of Republic of Croatia. However, there are a number of exceptions to the prospectus requirement, notably for offers worth less than EUR 5 million in the EU, calculated for a 12- month period.

The Lending model of Crowdfunding could be subject to the above rules on prospectus obligations in cases where the lending involves debt securities. In other cases, and for the Donations and Reward Model, it appears that the prospectus requirements will not be applicable.

2.4 Possible additional Regulations

In addition to the legislation mentioned elsewhere herein, other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Croatian Act on Money Laundering and Financing of Terrorism
- Croatian Act on Protection of Personal Data
- Croatian Companies Act

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Croatia

3.1 Status of AIFMD implementation

All EU member states should have implemented by 22 July 2013 the Alternative Investment Fund Managers Directive (2011/61/EU) ("AIFMD"). The implementation in Croatia has been made via the Alternative Investment Funds Act 2013 ("AIFA") which applies as of 1 July 2013 (the day of Croatia's accession to the EU) and relevant bylaws. This has brought a new layer of regulation on top of the "regular" collective investment scheme regime governed by Open-Ended Investment Funds Act.

3.2 Definition of an alternative investment fund ("AIF")

AIFA governs, *inter alia*, the terms for establishment and operation of AIFs and AIF management entities ("AIFMs"). AIF is defined as an investment fund established for the purpose of:

- raising assets through public or private offer; and
- investing these assets into different types of property in accordance with a strategy and investment targets defined upfront; and
- exclusively for the benefit of investors in such AIF.

AIFs can be open-ended (generally only a collection of assets without legal personality, managed by AIFM) or closed-ended (a company formed as stock corporation or a private limited liability company, managed by AIFM). Open-ended AIFs are not the public open-ended investment funds regulated by the Open-Ended Investment Funds Act, and they are not subject to the license requirements prescribed therein. Shares in AIFs can generally be offered both publicly and privately.

A Crowdfunding scheme where a non-standard profit sharing arrangement is provided might be construed as involving an investment fund in form of AIF. It should be noted that AIFA and the subsequent bylaws were rendered only very recently and there appears to be no settled practice in their application.

3.2.1 Operating company seeking funding

AIFA does not offer conclusive guidance on whether an operating company seeking funding by way of Crowdfunding might be considered as an AIF. It could be argued that the typical start-up seeking funding for its general commercial business is not AIF as (i) such company does not invest the received capital "in accordance with an upfront business strategy" (but only to finance its operations), and/or that (ii) the assets are not used "exclusively" for the benefit of the investors (as the fund-seeker is typically utilizing the majority or at least a small part of funds for its own business benefit).



Furthermore, it is likely that some support for this position could be successfully derived from the positions of European Securities and Markets Authority (ESMA) expressed in the 2012 “Guidelines on key concepts of the AIFMD”. Here it was essentially argued that an “ordinary company” with a “general commercial purpose” should not be considered as a collective investment undertaking.

However, as the practice of local authorities is yet to develop and having in mind the divergences in possible structures of Crowdfunding arrangements, a risk cannot be excluded that a particular kind of an operating company (e.g. a single project dedicated vehicle, or a company effectively operating a collective investment fund) might be construed as an AIF.

3.2.2 Crowdfunding platform

It can be said that the operator of a Crowdfunding platform does not raise capital from investors itself but only provides a “technical” service facilitating the capital raising by the fund-seeker. As the characteristics of AIF are not met, it appears that the operator of the Crowdfunding platform should not qualify as an AIF.

Furthermore, even if the underlying investment qualifies as an AIF, it could be argued that the Crowdfunding platform does not “manage” this investment, as the company seeking funding is the true manager of such AIF. Therefore it is likely that the Crowdfunding platform should not qualify as AIFM.

4 Conclusion

Croatian practice has yet to see the birth of operational Crowdfunding platforms and networks. There is also currently no regulatory regime in Croatia that is specifically adapted to Crowdfunding. However, operating the Equity Model, and even the Lending Model in some circumstances, may be subject to the provisions of Croatian law referring to securities, investment funds, consumer credits and payment services. These rules generally mandate obtaining specific approvals and/or registrations from Croatian authorities prior to performing the regulated activity. Some of the potential duties, such as the requirement of license for providing consumer credits or the prospectus obligation, can generally be avoided by appropriate structuring of the platform.

The AIFMD has been formally implemented in Croatia by very recent local laws and regulations. However, the historical total lack of operative Crowdfunding platforms did not lead to a chance for development of a firm regulatory practice in interpretation of legislative framework. Coupled with the fact that there are yet no published opinions of the authorities which could offer conclusive guidance on all the aspects of Crowdfunding regulation, it only remains to be seen whether there is true potential for emergence and any significant growth of local platforms.



5 Contact details of the authors:

Boris Andrejaš
Partner
boris.andrejas@babic-partners.hr



Boris Babić
Partner
boris.babic@babic-partners.hr



Joško Perica
Senior Associate
josko.perica@babic-partners.hr



Babić & Partners Law Firm Ltd
Nova cesta 60 (1st Floor),
10 000 Zagreb
Croatia

Tel +385 1 3821 124
www.babic-partners.hr

BABIĆ &
PARTNERS

CZECH REPUBLIC



1 Current Market of Crowdfunding platforms in the Czech Republic

In the Czech Republic, the Crowdfunding market is still in its developing phase, with project size and investment volume being relatively modest. Cultural and social projects significantly outnumber start-up funding or other business transactions. The following types of Crowdfunding are currently functioning:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

A Crowdfunding platform using the Equity Model has yet to emerge.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The Lending Model is still emerging in the Czech Republic. Two platforms specialising in peer-to-peer lending currently exist, even though lending volume is low and private loans to individuals currently outnumber business loans.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Rewards Model is the most developed Crowdfunding model, with several platforms functioning. While the majority of Crowdfunding ventures still support cultural or social projects, funding for start-ups is no longer uncommon. Please note that it is not appropriate to refer to a Donations Model, as the current platforms do not accept pure donations – instead, they structure the transactions as a sale of the offered rewards. This is done in order to avoid falling under the scope of Act No. 117/2001 Coll. on public collections, as amended the “APC”, which imposes significant administrative limitations on the public collection of donations.

2 Current Regulation of Crowdfunding platforms in the Czech Republic

2.1 Licence under the Act no. 240/2013 Coll., on management companies and investment funds, as amended (the “AMCIF”)

2.1.1 Equity Model

Investing in return for a share in the profits or revenue generated by a company/project is defined by the AMCIF as a form of collective investment.

Such activity corresponds most closely to the definition of an investment fund under the AMCIF. An investment fund is either a joint-stock company with its registered office in the Czech Republic or a

mutual fund (which is merely a collection of funds and has no legal personality) that is entitled or the purpose of which is (i) to collect funds from the public by issuing shares/participation certificates and (ii) to perform the collective investment of the collected funds on the basis of a given investment strategy based on the principle of the division of risk for the benefit of the owners of the shares/participation certificates and further (iii) to manage the funds (“Investment Fund”).

An Investment Fund can either (i) be managed by a management company, (ii) exist in the form of an Investment Fund which is entitled to manage itself or (iii) exist in the form of an Investment Fund which is managed by its executive body being a management company. All three possibilities (a management company, a self-managing Investment Fund and an Investment Fund managed by its executive body) are required to obtain a licence from the Czech regulator (i.e. the Czech National Bank).

The capital of an Investment Fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such Investment Fund. Given this high capital requirement, Crowdfunding platforms or project companies in the Czech Republic usually do not choose the Equity Model.

If a project company or a Crowdfunding platform acting under the Equity Model would intend to provide investment services, it would have to be properly licensed under Act no. 256/2004 Coll, on capital markets, as amended (the “Capital Markets Act”).

Investment services (“Investment Services”) under the Capital Markets Act include in particular:

- reception and transmission of orders in relation to investment instruments (i.e. in particular investment securities such as shares or bonds and derivatives – “Investment Instruments”);
- execution of orders in relation to Investment Instruments on behalf of a client;
- dealing in Investment Instruments on own account;
- management of client's assets under a contract with the client if an Investment Instrument is part of such assets;
- investment advice concerning Investment Instruments;
- underwriting and/or placing of Investment Instruments on a firm commitment basis;
- placing of Investment Instruments without a firm commitment basis; and
- services of safekeeping and administration of Investment Instruments for the account of clients (including custodianship and related services).

2.1.2 Lending Model

Under Czech law, the lending of money by individuals to a company/project in return for repayment of the loan and interest is a non-regulated activity. Despite the fact that the lending of money would occur through an online Crowdfunding platform, there are no regulatory requirements under Act no. 21/1992 Coll, on banking, as amended (the “Banking Act”). However, general civil and commercial rules on lending must be observed.

The Crowdfunding platform would also have to obtain a trade licence in order to be entitled to organise collective lending and borrowing.

Act no. 145/2010 Coll., on consumer credit (the “Consumer Credit Act”) only applies to individuals as consumers, not to companies. Should the project be undertaken by an individual who is to be

granted loans under the Lending Model, he/she cannot be qualified as a consumer within the meaning of the Consumer Credit Act, as long as he/she is going about his/her business activity or performing his/her profession in an independent way.

2.1.3 Donations or Rewards Model

The provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is thus not regulated by the AMCIF. However, a Crowdfunding platform which would organise such collection of funds would have to obtain a trade licence for these purposes.

Furthermore, the requirements of the APC apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the “Public Collection”) and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment. Any Public Collection has to be notified to the relevant Regional Authority (in Czech: “*krajský úřad*”). The Regional Authority subsequently scrutinizes the application and may reject it for non-compliance with the statutory requirements, in particular if it finds that the purpose of the Public Collection is not publicly beneficial. Furthermore, detailed records of the contributions must be kept and must be submitted to the Regional Authority after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, current Crowdfunding platforms refrain from the use of the Donations model. Instead, the Rewards model is used where each project typically has to define rewards for contributors and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

2.2 Licence under the Act no. 284/2009 Coll, on payment services, as amended (the “Payment Services Act”)

Should the Crowdfunding platform intend to perform payment services itself in the Czech Republic, it would have to be properly licensed. There is the possibility to become either (i) a payment institution, (ii) a small-scale payment service provider, (iii) an electronic money institution or (iv) a small-scale electronic money issuer under the Payment Services Act. Becoming a payment institution or an electronic money institution requires a licence granted by the Czech National Bank. Becoming a small-scale payment service provider or a small-scale electronic money issuer requires registration with the Czech National Bank.

In any event, the Crowdfunding platform could also outsource payment services, which would not trigger any licensing or registration requirements.

2.3 Prospectus requirements

Under the Capital Markets Act, the general prospectus requirement does not apply where the offering of investment securities (i.e. shares, bonds, securities substituting shares or bonds, securities enabling the acquisition or sale of shares or bonds, certain derivatives, or similar securities) in all member state of the European Union does not exceed EUR 1,000,000 within a time period of 12 months.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act 455/1991 Coll., on trading, as amended (which regulates trade licences) (the "Trade Licensing Act");
- Capital Markets Act;
- Act 253/2008 Coll., on some measures against the legalisation of proceeds gained from criminal conduct and financing of terrorism (AML provisions) (the "AML Act");

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in the Czech Republic

3.1 Status of AIFMD implementation

Act no. 240/2013 Coll., on management companies and investment funds, as amended (i.e. AMCIF, as mentioned above), which implements the Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers ("AIFMD"), has taken effect as of 19 August 2013 (with certain provisions taking effect at a later date).

3.2 Definition of an alternative investment fund ("AIF")

Under the AMCIF, an alternative investment fund constitutes either a special fund or a fund of qualified investors.

A special fund under the AMCIF is defined as an Investment Fund which does not fulfil the requirements stipulated by the law of the European Union and thus is not registered in the relevant register kept by the Czech National Bank.

- The AMCIF defines a fund of qualified investors as: a legal entity (limited partnership, limited liability company, joint stock company, *societas europea* or cooperative) with its registered office in the Czech Republic that is entitled to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation securities or in a way that such qualified investors become its shareholders, and (ii) perform collective investment of the collected funds or assets that can be valued in money on the basis of a given investment strategy for the benefit of such qualified investors, and (iii) to manage such assets; or
- a mutual fund the purpose of which is to (i) collect funds or assets that can be valued in money from several qualified investors by issuing participation certificates and (ii) invest the

- collected funds on the basis of a given investment strategy for the benefit of the owners of the participation certificates and (iii) manage these assets; or
- a trust fund (i) the statutes of which identifies several qualified investors as beneficiaries; such beneficiaries are the founder of the given trust fund or the person that increased the assets of the given trust fund on the basis of a contract and (ii) which is established for the purpose of investment on the basis of a given strategy for the benefit of its beneficiaries

3.2.1 Operating company seeking funding

Assuming that an “operating company” to mean a start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, the operating company falls under an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and the further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is not regulated by the AMCIF; therefore, an operating company can neither fall under the definition of a special fund nor of a fund of qualified investors under the AMCIF.

Of course, the operating company would have to obtain a relevant trade license in order to be able to conduct its business.

3.2.2 Project Company seeking funding

Equity Model

As long as a project company is acting under the Equity Model (i.e. it invests in return for a share in the profits or revenue generated by such project company), then the provisions in the AMCIF apply to it. An investor in a project company acting under the Equity Model would probably not qualify as a qualified investor (as defined by the AMCIF), so a project company acting under the Equity Model would probably not constitute a fund of qualified investors under the AMCIF. However, it cannot be ruled out that such project company could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, if a project company acting under the Equity Model would intend to provide Investment Services (as defined above), it would have to be properly licensed under the Capital Markets Act.

Lending Model

Under Czech law, the lending of money by individuals to a company/project in return for the repayment of the loan plus the payment of interest is a non-regulated activity. Despite the fact that the lending of money would occur through an online Crowdfunding platform, there are no regulatory requirements under the Banking Act. However, general civil and commercial rules regarding lending have to be observed.



Donations or Rewards Model

The provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF. Collecting funds or assets that can be valued in money the main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such collected funds or assets that can be valued in money (or assets gained for such funds or assets that can be valued in money) does not constitute collective investment. Such activity is not regulated by the AMCIF; therefore, a project company that follows the Donations or Rewards Model can neither fall under the definition of a special fund nor of a fund of qualified investors under the AMCIF.

3.2.3 Crowdfunding Platform

Should the Crowdfunding platform organise funding for project companies under the Equity Model, it would probably not constitute a fund of qualified investors under the AMCIF (as an investor of a project company acting under the Equity Model would probably not qualify as a qualified investor, as defined by the AMCIF). It cannot be ruled out, however, that such Crowdfunding platform could constitute a special fund under the AMCIF (i.e. an AIF under the AMCIF).

The capital of a special fund has to reach at least EUR 1,250,000 within six months of the date of the establishment of such special fund.

Also, should the Crowdfunding platform intend to provide Investment Services (as defined above) when organising funding for project companies under the Equity Model would, it would have to be properly licensed under the Capital Markets Act.

Should the Crowdfunding platform organise funding for project companies under the Lending Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the lending of money by individuals to a company/project in return for the repayment of the loan plus the payment of interest is a non-regulated activity.

Should the Crowdfunding platform organise funding for project companies under the Donations or Rewards Model, it would neither constitute a special fund nor a fund of qualified investors, as the AMCIF would not apply due to the fact that organising the provision of money by individuals to a company/project for benevolent reasons or for non-monetary reward constitutes an exemption under the AMCIF.

4 Conclusion

Existing Czech Crowdfunding platforms usually chose the Rewards Model due to the fact that the regulations of capital markets or of collective investment together with regulations on public collections do not apply on the Rewards Model. The Equity Model, due to the regulatory requirements, is the most expensive variant.



5 Contact details of the authors:

Martina Březinová
Counsel
martina.brezinova@kinstellar.com



Kinstellar
Na příkopě 19
11719 Prague
Czech Republic

Tel +420221622111
www.kinstellar.com

KINSTELLAR

Adam Němec
Junior Associate
adam.nemec@kinstellar.com





DENMARK



1 Current Market of Crowdfunding platforms in Denmark

In Denmark, there are three broad types of Crowdfunding, each distinguishable by the kind of return that the funder receives. As Crowdfunding has only been available in Denmark since 2011 the number of successful projects and the amounts raised have been limited (DKK 700,000 was raised in 2012).

Four Crowdfunding platforms have been established in Denmark so far. The Danish Crowdfunding platforms offer three types of Crowdfunding, however, despite that the three different types of Crowdfunding is available, there have only been established a limited number of the Rewards Model Crowdfunding as the Danish market is still at an early stage:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Currently there is one Crowdfunding platform in Denmark who intends to offer the Equity Model. However, the Crowdfunding platform www.crowdinvest.dk has not yet launched any projects as they are awaiting expected guidance from the Danish Financial Supervisory Authority on Crowdfunding based on the Equity Model.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

One Danish Crowdfunding platform www.crowdfunding.dk offers the Lending Model, however no projects have been launched where the borrower is intended to repay the money raised via the Crowdfunding platform. Accordingly, no projects based on the Lending Model have currently been launched.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In Denmark the Donations or Rewards Models do not involve any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation. The Donations or Rewards Model is primarily used to finance social, creative or charity projects or companies. Investors fund projects or companies and normally receive non-monetary rewards (e.g. discounts, CD's, tickets or rewards of a symbolic value).

1.4 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In Denmark the Donations or Rewards Models do not involve any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation. The Donations or Rewards Model is primarily used to finance social, creative or charity projects or companies. Investors fund projects or companies and normally receive non-monetary rewards (e.g. discounts, CD's, tickets or rewards of a symbolic value).

2 Current Regulation of Crowdfunding platforms in Denmark

2.1 Licence under the Danish Financial Business Act

2.1.1 Equity Model

Rendering of investment services in Denmark commercially are regulated activities under Danish law and such activities are subject to a licensing requirement from the Danish Financial Supervisory Authority according to the Danish Financial Business Act (Consolidated Act No. 948 of 2 July 2013).

For the purpose of Danish law "**investment services**" are, inter alia, receipt and arrangement for the account of investors of orders in relation to one or more financial instruments and, execution of orders with one or more financial instruments.

Financial instruments within the scope of the Danish Financial Business Act include securities and financial instruments.

Securities include shares in companies and other securities equivalent to shares in companies, partnerships and other businesses, and share certificates, bonds and other debt instruments, including certificates for such securities, and any other securities of which securities as mentioned above can be acquired or sold, or give rise to a cash settlement, the amount of which is fixed with securities, currencies, interest rates or returns, commodities indexes and other indexes and targets as reference.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment schemes, options, futures, swaps, credit derivatives, financial contracts for difference and foreign-exchange spot transactions.

If a Crowdfunding platform facilitates the offering of securities or financial instruments, the operator of the platform renders investment services and is therefore subject to the licensing requirement under the Danish Financial Business Act; however, the Danish Financial Supervisory Authority is contemplating issuing guidance on their interpretation of the regulation of the Crowdfunding Equity Model during 2013.

2.1.2 Lending Model

Any activity in Denmark comprising receiving from the public deposits or other funds to be repaid requires a license in accordance with the Danish Financial Business Act. We understand that the Lending Model is based on the concept, that the Crowdfunding platform provider will repay the deposits provided by the investors, which under Danish law requires a license. Currently only one Danish platform offers the Lending Model (www.crowdfunding.dk) but no projects have been launched based on the Lending Model. In addition, www.crowdfunding.dk does not currently appear to be a licensed entity on the homepage of the Danish Financial Supervisory Authority.

2.1.3 Donations or Rewards Model

The Donations and Rewards Model is structured in order not to constitute any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation and therefore the Crowdfunding platform provider operating this model is not subject to any financial regulation or license requirements.

2.2 Licence under the Danish Payment Services and Electronic Money Act

Under Danish law the rendering of payment services requires an authorisation from the Danish Financial Supervisory Authority pursuant to the Danish Payment Services and Electronic Money Act (Consolidated Act No. 365 of 26 April 2011). The transmission of funds between the potential investor and the project/entity which is being funded may require the Crowdfunding platform provider providing “money remittance” services under the Danish Payment Services and Electronic Money Act. However, in order to avoid the licensing requirements the Crowdfunding platform provider could cooperate with an external provider or partner for processing payments rather than acting as an intermediary himself.

2.3 Prospectus requirements

The public offering and sale of securities or investment products to investors is subject to a prospectus requirement pursuant to the Danish Securities Trading Act (Consolidated Act No. 982 of 6 August 2013). However, as the Danish Crowdfunding offers are very limited most Crowdfunding offers fall within the exemption for offers worth less than EUR 1,000,000 in a period of 12 months. There are other exemptions that may be applicable if single issues exceed this level. However, as the Danish offerings are very limited, and fall below the threshold of EUR 1,000,000 in a period of 12 months no prospectus requirement is likely to apply in respect of the three types of Crowdfunding which are currently available or will be in the near future in Denmark.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- The Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism (Consolidated Act No. 1022 of 13 August 2013);



- The Danish Marketing Practices Act (Consolidated Act No. 58 of 20 January 2012);
- The Danish Investment Associations, etc. Act. (Act No. 597 of 12 June 2013) (depending how the Crowdfunding arrangements are structured, the investment may be characterised as units in a collective investment scheme and thereby subject to the Danish Investment Associations, etc. Act;
- The Danish Act on Credit Agreements (Consolidated Act No. 761 of 11 June 2011).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Denmark

The Danish Act on Alternative Investment Fund Managers (Act No. 598 of 13 June 2013) applies when the investment involves an “alternative investment fund” (“AIF”) as a collective investment undertaking which raises capital from a number of investors, and which invests in accordance with a defined investment policy for the benefit of its investors. As the provider of a Crowdfunding platform does not itself raise capital from investors the provider should not constitute an AIF. In addition, as Danish Crowdfunding is very limited at this stage it is not likely that the Danish Act on Alternative Investment Fund Managers will apply to any Crowdfunding providers, as there is an exemption from the Danish regulation for managers with total assets under management of less than EUR 100 million.

The AIFM Directive was implemented into Danish legislation by the Act on Alternative Investment Fund Managers (Act No. 598 of 13 June 2013).

4 Conclusion

As the Danish market for Crowdfunding is very limited, there is currently no regulatory regime that is specifically adapted to Crowdfunding in Denmark. However, the Danish Financial Supervisory Authority is contemplating issuing guidance on their interpretation of the current investment services regulation in respect of the Crowdfunding Equity Model during 2013 in order to set out specific guidelines on the offering of securities through a Crowdfunding platform.

As for the Lending Model this is already subject to regulation – and if the structure of the Lending Model is based on receiving deposits from the public or other funds to be repaid, the Lending Model will be subject to an authorisation requirement.



5 Contact details of the author:

Tobias Linde
Partner

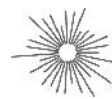
tl@gorrissenfederspiel.com



Gorrissen Federspiel
H.C. Andersens Boulevard 12
DK-1553 Copenhagen V

Tel: +45 33 41 41 61

www.gorrissenfederspiel.com



Gorrissen Federspiel



ESTONIA



1 Current Market of Crowdfunding platforms in Estonia

On the basis of current Estonian law theoretically all three Crowdfunding models (i.e., the Equity Model, the Lending Model and the Donations or Rewards Model) are possible. Currently in Estonia two types of Crowdfunding are used.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

There are no operating Crowdfunding platforms based on Equity Model in Estonia.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There are two peer-to-peer lending platforms in Estonia where individuals and businesses can invest and individuals can borrow money according to the terms (e.g. investment rate, interest, etc.) they agree on. There are no Crowdfunding platforms which would enable businesses to take loans, however, loans can be taken by natural persons to use for business purposes.

The activity of the platforms is loan brokerage and loan handling. The platforms control and analyse to a certain extent borrowers' loan history, payment defaults, financial status and/or bank account statements. The platforms enable the meeting of lending and borrowing interests and mediate payments between lenders and borrowers.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model is currently used by one platform to finance creative projects (including design, music, art, film & photo, theatre). No financial investment or return is involved. Investors fund projects or companies and get no return at all or a non-monetary reward (e.g. tickets, books, thank you notes in publications etc.). In many cases these rewards are of a symbolic value only.

2 Current Regulation of Crowdfunding platforms in Estonia

2.1 Licence under the Estonian Securities Market Act (*väärtpaberituru seadus*) and Credit Institutions Act (*krediitiasutuste seadus*)

2.1.1 Equity Model

This model is not currently used in Estonia. The structure of equity-based platforms in Estonia could be shaped by the investment services regulation set forward in the Securities Market Act.

Investment services and activities include, inter alia, reception and transmission of orders related to securities, execution of orders related to securities in the name of or for the account of the client and organising an offer or issue of securities. Activity licences are required if such services are provided on professional basis as a permanent activity.

Securities are, inter alia, (a) shares in public limited companies (*aktsiaselts*) and other transferable securities equivalent to such shares; (b) bonds or other forms of securitised debt; (c) investment fund units; or (d) any other securities giving the right to acquire or sell any such transferable securities or the price of which is determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

It is worth noticing that shares in Estonian private limited companies (*osaühing*) are often not transferable securities due to the pre-emptive right of other shareholders under the Commercial Code (*äriseadustik*).

In summary, where an online Crowdfunding platform facilitates the offering of transferable securities, or its operator acts as a securities broker, most likely, the operator of the platform will be deemed to provide investment services within the meaning of the Securities Market Act and therefore will require an investment firm licence by the Estonian Financial Supervision Authority (EFSA).

However, as mentioned above, the licensing requirements only apply if services are provided in relation to tradable securities. Therefore, if the equity model entails offering or brokerage of securities which are not transferable (e.g. shares in private limited companies where the pre-emptive right of other shareholders exists) or facilitating the formation of limited partnerships (*usaldusühing*) or the joining of additional partners into such limited partnerships, such activities do not constitute provision of investment services. Therefore, no licensing requirement under the Securities Market Act would apply.

2.1.2 Lending Model

Depending on the detailed structure of how the Lending Model is used, loans issued using the Lending Model are generally not considered as tradable securities and their offering or brokering would therefore not qualify as provision of investment services under the Securities Market Act.

Pursuant to the Credit Institutions Act, a company intending to receive cash deposits or other repayable funds from the public in any other manner and to grant loans for its own account and



provide other financing, is a credit institution. The right to receive money from the public for the purposes of depositing is the exclusive right of the credit institution. In order to exercise this right the credit institution must hold a corresponding authorisation granted by the EFSA.

In Estonia, the Lending Model is based on loans between individuals and companies and is represented by private limited companies providing lending brokerage. Under Estonian models, the companies operating the platforms do not grant loans on their own account. Instead, they provide relevant information between potential borrowers and lenders. The whole process of investing and lending is under platform clients' own control.

Normally, the operators of platforms using the Lending Model receive money from lenders/borrowers, to pay the money on to, respectively, the borrowers as disbursement of the loan or the lenders as repayment of loan or interest.

However, in case a lending and borrowing interest do not meet, it may happen that the person who wanted to lend money may demand repayment of the funds from the platform operator, which may be deemed receipt of repayable funds from the public on part of the operator.¹⁸ On the other hand, the sums transferred to the operator are repaid only under exceptional circumstances and the repayment of sums is not the essence of the business. Therefore, we would conclude that the risk that such platform operators are considered to receive money from the public for the purposes of depositing is not great.

Consequently, these broking companies are not credit institutions within the meaning of the Credit Institutions Act and do not require a licence for operation. However, if a company wishes to use the Lending Model in Estonia by gathering money from lenders and borrowing it on its own account, such activity would most probably require a credit institution license.

No license or registration is required in Estonia to provide services relating to consumer credit. However, certain rules must be followed (see section 2.4).

2.1.3 Donations or Rewards Model

Depending on the detailed structure it could be stated that these kinds of investments do not qualify as investment services as they do not relate to (tradable) securities.

Also, as the money is donated rather than lent, such activity should not require a banking license. In case the platform operator, under certain circumstances, repays the money donated to the donator, the analysis of whether such activity would constitute receipt of repayable funds from the public above would equally apply here. Similarly to the above analysis, in our opinion, it should not be deemed as receipt of repayable funds from the public.

¹⁸ In regards of (licensed) payment institutions § 5-3 of the Payment Institutions and E-money Institutions Act specifically provides that payment institutions may use the payment accounts held by them only for the execution of payment transactions. It also provides that funds received from a client of the payment institution for the provision of payment services shall not be deemed to be a deposit or other repayable funds within the meaning of § 4 of the Credit Institutions Act.

2.2 Licence under the Payment Institutions and E-money Institutions Act (*Makseasutuste ja e-raha asutuste seadus*)

In addition to the requirements set out above, any transfer of funds through the operator of a Crowdfunding platform may generally constitute payment services (if a payment account is opened) or money remittance services (if no payment account is opened) within the meaning of the Payment Institutions and E-money Institutions Act. Transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the person taking advantage of the Crowdfunding financing scheme, or back to the investor in case the funding transaction fails.

The platform operator might rely on the exemption for commercial agents under the Payment Institutions and E-money Institutions Act. However, there is no established practice in Estonia regarding when the commercial agents exemption applies

As an alternative - in order to avoid such licensing or the need to apply for an exemption, as a case may be, requirements - the operator of a Crowdfunding platform might use an external provider or partner for processing payments rather than acting as an intermediary himself.

We are not aware of any cases in Estonia where a Crowdfunding platform holds a payment institution license or where either of above exemptions has been applied to a Crowdfunding platform. Thus, in each situation where any of these exemptions is considered we strongly recommend that beforehand respective project the structure of each platform is coordinated with the EFSA and/or local counsel is involved.

2.2.1 Prospectus requirements

If securities (including tradable shares and/or bonds) are publicly offered to investors, the company issuing the securities has to publish a prospectus. The prospectus can be published only after the EFSA approves it. Where securities are publicly offered through a Crowdfunding platform, the operator of the Crowdfunding platform should ensure that the securities are publicly offered through the Crowdfunding platform only after the prospectus is published.

Requirements for the preparation, submission and approval of the prospectus and exemptions from the requirement to publish the prospectus are established by the Securities Market Act. In contrast to several other countries, where the prospectus requirement does not apply to the offering of securities with a value of EUR 5 million or less within a one-year period, in Estonia specific requirements towards the prospectuses in such offerings are established by a regulation of the Minister of Finance (*Nõuded väärtpaberite avaliku pakkumise, kauplemis- ja noteerimisprospektile*). Therefore, publicly offering securities using a Crowdfunding platform in Estonia is likely to require publication of a prospectus, subject to certain exemptions.

The prospectus is not required if securities are not offered publicly (definition of public offer as defined in the Prospectus Directive). Also, the prospectus requirement does not apply if the securities offered are not tradable

The platforms operating Lending Model and Donations and Rewards Model are not subject to prospectus requirements.

2.2.2 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- The Law of Obligations Act (*võlaõigusseadus*);
- The new Investment Funds Act (*investeerimisfondide seadus*), incorporating AIFMD;
- Money Laundering and Terrorist Financing Prevention Act (*rahapesu ja terrorismi rahastamise tõkestamise seadus*);
- Estonian Advertising Act (*reklaamiseadus*);
- Personal Data Protection Act (*isikuandmete kaitse seadus*);
- Consumer Protection Act (*tarbijakaitse seadus*)

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Estonia

3.1 Status of AIFMD implementation

The Law enabling alternative investment fund managers (AIFM) from other EU countries marketing EU AIFs to passport to Estonia was passed on 20 June 2013. It is effective of 22 July 2013. Further Law alongside the guidance in the form of an explanatory memorandum to the draft Investment Funds Act which should transpose other provisions of the AIFMD into Estonian law is currently being drafted. A draft of the new Investment Funds Act is expected to be available later in 2013. The new Investment Funds Act is expected to come into force before 22 July 2014.

3.2 Definition of an alternative investment fund ("AIF")

According to the partial draft of the Investment Funds Act that has been made available to us, an alternative investment fund will be defined as an investment fund that is not a UCITS, a pension fund or an employers' pension fund established as a public limited company. An investment fund, according to the draft, is a legal person or a pool of assets, into which the capital of several investors has been collected with the purpose of collectively investing it in accordance with a predetermined investment policy and in view of common interests.

An alternative investment fund manager is a manager who complies with the requirements provided for in the Council Directive 2011/61/EU on Alternative Investment Fund Managers amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, and who has the right to manage one or more alternative funds.

Therefore, it is crucial to the impact of the future national AIFMD regulations on Crowdfunding whether any of the participants qualifies as an AIF or an AIFM. As the full draft and explanatory memorandum of the new Investment Funds Act are not yet available, we cannot comment further on the differentiation that will be made between AIFs and "operating companies", as well as possible



obligations of Crowdfunding platforms under the AIFMD implementing legislation. Due to the uncertainty of implementation of AIFMD in the national law of Estonia and possible regulation of alternative investment funds, further analysis of the regulation of Crowdfunding platforms under the AIFMD regime in Estonia is not provided.

4 Conclusion

There is currently no regulatory regime that is specifically adapted to Crowdfunding in Estonia. There is no operating Equity Model in Estonia, but this type of model might be subject to investment services or securities market regulation and thus be supervised by the FSA if the platform provides investment services such as securities brokering or organising an offer or issue of securities. In addition, those securities that are publicly offered are subject to the prospectus requirements.

The Donations and Rewards Model fall outside of the financial services scope and corresponding regulation.

The lending-based platforms in Estonia are not subject to financial regulation and operate without any authorisation.

In case of Crowdfunding platforms using any of the above models, it should be analysed on a case by case basis whether a payment institution license or applying for an exemption from the licensing obligation is needed.

To conclude, the two models of Crowdfunding platforms operating in Estonia operate without any licence or supervision by the FSA. In regards of the AIFMD regulation impact on Estonian Crowdfunding platforms, the Estonian law developments should be further reviewed.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the authors:

Reimo Hammerberg
Partner

reimo.hammerberg@sorainen.com



SORAINEN
Pärnu mnt 15
10141 Tallinn
Estonia

Tel +372 6 400 900

www.sorainen.com



Helen Ratso
Associate

helen.ratso@sorainen.com



FINLAND



1 Current Market of Crowdfunding platforms in Finland

In Finland, there are three broad types of Crowdfunding:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

At present the Finnish platforms offering the Equity Model operate without financial institution license and outside the scope of prospectus requirements. They currently only engage in contract or investment broking.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There are two possible types of Lending Model Crowdfunding in Finland:

- Offer of bonds in return for investment.
- Peer-to-peer lending and the use of ordinary promissory notes for Crowdfunding.

To our knowledge, bonds are not at present offered in return for Crowdfunding investment in Finland. The only type of Lending Model actively in use in Finland is the peer-to-peer lending and currently the platforms providing peer-to-peer lending operate outside the regulatory scope.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The platforms using the Donations or Rewards Model are not subject to financial services regulation in Finland, unless they receive repayable funds from the public. Currently there is only one platform providing the Donations or Rewards Model and it operates mainly in the field of social or creative projects and outside the scope of financial services regulation.

The use of Donations Model is not viable in Finland in the same form as in other countries and always requires a fundraising permit granted by the authorities. The fundraising permit may only be issued for associations or foundations registered in Finland and whose sole purpose is to work for public good.

2 Current Regulation of Crowdfunding platforms in Finland

2.1 Licence under the Finnish Credit Institutions Act (*Laki luottolaitostoinnista*) and Investment Services Act (*Sijoituspalvelulaki*)

2.1.1 Equity Model

Pursuant to the Finnish Act on Credit Institutions (Laki luottolaitostoiminnasta) and Act on Investment Services (Sijoituspalvelulaki) implementing the EU Credit Institutions Directive and the EU Markets in Financial Instruments Directive (MiFID) in Finland, the provision of banking or investment services are regulated activities. Any firm offering investment services in Finland shall have the license of an investment firm or of a credit institution. This applies to offering of investment services in Finland irrespective of whether the service is offered to professional or non-professional investors.

The provision of investment services includes, for example, investment broking (reception and transmission of orders in relation to financial instruments and their execution on behalf of customers), contract broking (execution of purchase and sale orders on behalf of others) and the offer to the public of financial instruments without a firm commitment basis. Financial instruments within the meaning of the Act on Investment Services include transferable securities (i.e. shares and bonds or other forms of securitised debt) and other financial instruments. The offer to the public of shares is regulated as the issue of securities in accordance with the Securities Markets Act (Arvopaperimarkkinalaki).

Pursuant to a current interpretation of the Finnish Financial Supervisory Authority, the operations of Crowdfunding platforms offering the Equity Model do not fulfil the MiFID definition of investment services requiring a license since the loan contracts are made directly between the lender and the company without influence by the platform provider. However, it is to be noted that the application of the MiFID is dependent on the services provided by the Crowdfunding platform and the scale of its operations. At present, the Finnish platforms offering the Equity Model operate without financial institution license and only participate in contract or investment broking.

2.1.2 Lending Model

The treatment of the Crowdfunding platform is dependent on how the service of the platform and the product it offers are constructed. Similarly, as explained above in respect of the Equity Model, the offer to the public of bonds is regulated as the issue of securities in accordance with the Securities Markets Act.

Currently the platforms providing peer-to-peer lending operate outside the regulatory scope. Pursuant to the current interpretation of the Finnish Financial Supervisory Authority, licenses are not required for peer-to-peer lending since individual loan agreements do not constitute regulated financial instruments and, therefore, lending of funds to a company from the crowd through individual loan agreements has been interpreted to be an unregulated activity. This applies also to financing arranged through ordinary promissory notes (in Finnish: tavallinen velkakirja). However, if the Crowdfunding platform makes the investment decisions on behalf of the investors, the registration requirements arising from the AIFM Directive may apply.

2.1.3 Donations or Rewards Model

The platforms using the Donations or Rewards Model are not subject to financial services regulation in Finland, unless they receive repayable funds from the public. Pursuant to the Finnish Act on Credit



Institutions (Laki luottolaitostoinnasta), an authorisation to act as a credit institution is required if repayable funds are received from the public.

Currently there is only one platform providing the Donations or Rewards Model in Finland and it operates outside the scope of financial services regulation. It works as a matchmaking platform between the party seeking funding and the investors and does not gain the possession of the funds at any point. The platform using the Donations or Rewards Model operates mainly in the field of social or creative projects.

2.2 Licence under the Payment Institutions Act (*Maksulaitoslaki*) (*Payment Services Directive*)

Crowdfunding platform operators receive funds from investors after the financing round is completed and it has been deemed successful. This may be considered money remittance in accordance with the Finnish Payment Institutions Act (*Maksulaitoslaki*) implementing the Payment Services Directive. In order to provide payment services, service providers must either acquire authorisation for their business in line with the Payment Institutions Act or, in case of smaller scale activities, submit a notification of intention to provide payment services without authorisation. This requires that the service provider fulfills the requirements stipulated in the Payment Institutions Act applicable to the provision of payment services without authorisation.

There are good reasons to argue that transfer of funds through the platform operator's customer deposit account does not constitute money remittance service and that the operators would be able to rely on the exemption of commercial agents on the basis that they have authorisation to negotiate or conclude contracts on behalf of the funder and the fund seeker. However, this interpretation has not been tested and the platform providers may be required to acquire authorisation or make notification. Especially the legal treatment of the lending model from this perspective is currently not resolved satisfactorily.

To avoid the license requirements the Crowdfunding platform provider may also use an external authorised payment service provider to process the payments.

2.3 Prospectus requirements

Pursuant to Finnish Securities Market Act ("SMA"), anyone who offers securities to the public or applies for the admission to public trading of a security shall be under an obligation to publish a prospectus relating to the securities before the entry into force of the offer or the admission to public trading and to have it available for the public during the validity of the offer. Shares and bonds are regarded as securities in accordance with the SMA in Finland. At present, all Crowdfunding platform providers operate under the exemptions of the regulatory regime. The prospectus requirement does not apply to an offering of securities with a total consideration of less than EUR 1,500,000, calculated for a preceding 12-month period. However, when evaluating the total consideration for securities included in the above mentioned offer, offers for the same type of security throughout the EEA are considered.

A prospectus is also not required when the total value of securities offered is less than EUR 5,000,000, admission is applied for the securities to be traded in Finland on the First North market



place and a company description compliant with the regulations of the said market place is kept available for investors.

No prospectus requirement is likely to apply in respect of the Donations or Rewards Model or peer-to-peer lending.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Fundraising Act (Rahankeräyslaki)

In other parts of the world, Crowdfunding has been widely used to raise finance for charity targets and to support arts projects. In Finland, the decision of the National Police Board restricts the use of Donations Model: collecting money without consideration and for charity requires a fundraising permit granted by the authorities. According to the Finnish Fundraising Act, fundraising permit may be issued for an association or foundation which is registered in Finland and if the sole purpose of the association is to work for public good. Furthermore, according to the Fundraising Act, money can be collected only for charitable purposes. The fundraising permit may not be issued for an individual.

Despite the strict interpretation of the Fundraising Act, the only platform in Finland offering the Donations or Rewards Model does promote projects with a charitable purpose. The platform requires that a fundraising permit is acquired before the project can be entered in the platform.

- Consumer Protection Act (*Kuluttajansuojalaki*), Act on Registration of Certain Creditors (*Laki eräiden luotonantajien rekisteröinnistä*)

The Finnish Consumer Protection Act regulates domestic and distance selling for consumers as well as distance selling of financial services and instruments. No conduct that is inappropriate or otherwise unfair from the point of view of consumers shall be allowed in marketing. In addition, false or misleading information shall not be conveyed in marketing. It is as well forbidden to not provide such information in marketing or consumer relations, which is relevant taking into account the context and which the consumer needs for a proper purchase decision.

The Consumer Protection Act also regulates offering of consumer credits and sets out several obligations with respect to offering of credits to consumers. These obligations include, for example, duty of disclosure of a company offering consumer credits with regard to interest rate and other costs related to the credit, amount of credit and credit limit, duration of the credit agreement, cash price of the commodity, the aggregate amount of the credit, credit costs and number of installments. Additionally, obligations include e.g. duty to provide the consumers with sufficient information on the credit before entering into the credit agreement, obligation of the company offering the credit to act in accordance with principle of responsibility, duty to assess the creditworthiness of the consumer before entering into

the credit agreement, obligation to verify the identity of the consumer applying for the credit and duty to inform the consumer if the creditor's rights under the credit agreement or the agreement itself will be assigned to a third party. In addition, a Crowdfunding platform provider offering consumer credits has an obligation to register in the register for creditors pursuant to Act on Registration of Certain Creditors (*Laki eräiden luotonantajien rekisteröinnistä*) provided that a payment institution license or a credit institution license is not required with respect to offering of the services. Currently there are no Crowdfunding platforms operating in Finland that provide consumer credit.

Consumer complaints may be made by consumers to the Finnish Consumer Disputes Board. The Board issues non-binding recommendations. If a larger number of consumers have a dispute with the same business regarding the same matter or if a business has concluded a contract containing an unfair term with many consumers, a group complaint can be filed by the Finnish Consumer Ombudsman to the Consumer Disputes Board after considering a case. A case may be heard as a class action, if several persons have claims against the same defendant and based on the same or similar circumstances. A class action is brought by the Consumer Ombudsman, who also represents the class.

- Finnish Act on Preventing and Investigating Money Laundering and Funding Terrorism (*Laki rahanpesun ja terrorismin rahoittamisen estämisestä ja selvittämisestä*)
- Personal Data Act (*Henkilötietolaki*)

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Finland

3.1 Status of AIFMD implementation

The Finnish Ministry of Finance has on 25 June 2013 made available a (new) text of the proposals for implementing acts of the Directive in Finland (the Draft Proposal). The Draft Proposal is intended to form the Government Proposal to be submitted to the Parliament early in the autumn of 2013. The Government Proposal will include a text for a new Act on Alternative Fund Managers (*Laki vaihtoehtorahastojen hoitajista*) (the Act) as well as dozens of amendments to existing legislation. After submission to the Parliament, the Government Proposal will be processed through parliamentary committees and will be voted upon in the Parliament plenary. All in all, we would expect the Act to enter into force before year end, but most likely not before November 2013. Please note, however, that our responses in this memorandum remain subject to changes in the forthcoming preparatory process of the Act.

The Draft Proposal also addresses Crowdfunding aspects in Finland on a general level. The Draft Proposal implies that due to the fact that Crowdfunding has not yet been profoundly established in Finland as well as the fact that it may be conducted in various manners, it is somewhat difficult to assess whether it would fall within the scope of the Act. However, if the conditions set out in the Act are met, some forms of Crowdfunding may fall within this scope.

3.2 Definition of an alternative investment fund ("AIF")

The Act sets the following criteria for an AIF which must all be fulfilled in order for an undertaking to be qualified as an AIF: (i) acquires funds or receives capital from (ii) several investors, (iii) invests in accordance with a defined investment policy (iv) for the benefit of the investors, and (v) the undertaking is not a UCITS fund.

3.2.1 Operating company seeking funding

Pursuant to the Act, an operating company (in Finland: a limited liability company) within a certain field and seeking for funding with the purpose of generating profit to its shareholders would be excluded from the definition of an AIF (usually such a company does not have a defined investment policy for the benefit of the investors). In such business, the investors do not typically have the possibility for evaluation on a daily basis or supervision of investment targets. However, an operating company may also have an intention to invest into certain investment targets, which might constitute an AIF (with the exemption of holding companies which are excluded from the scope of the Act). It should also be noted that an operating company would not normally constitute an AIF in the event of Lending, Equity or Donations or Rewards model, in which the investor itself chooses the investment target, since activities in which investment decisions are made by the investor itself are not regarded as AIF activities.

3.2.2 Project Company seeking funding

The Act does not apply to business in which collective investments are not conducted in the form of an AIF. In the event that collective investments are connected to the regular business of an entity and where the investors maintain a significant control over the project, such joint ventures (established to finance a single project) would not be regarded as AIFs. However, it cannot be ruled out that a project company would constitute an AIF in the event that the project company would have several investors (at least two) and there would be a collective investment policy.

3.2.3 Equity Model

Primarily it would seem that in the type of Equity Model Crowdfunding, where the investment decisions are made by the investors and there is no collective investment policy, the criteria for an AIF are not met. However, Equity Model Crowdfunding may constitute an AIF in the event that there is an element of collective investment policy and the other qualifications of an AIF are met.

3.2.4 Lending Model

Similarly as in respect of the Equity Model, it would seem that Lending Model does not constitute an AIF, where the investor retains the power to make the investment decisions. However, it is possible that such types of the Lending Model, in which the investment decisions are made according to a defined investment policy, the qualifications of an AIF could be met.



3.2.5 Donations or Rewards Model

The Crowdfunding platforms offering the Donations or Rewards Model are not likely to be governed by the Act since the investor in such Model retains the power to consider, supervise and make investment decisions and there is no element of collective investment policy.

3.2.6 Crowdfunding Platform

It is possible that the Crowdfunding platform could constitute an alternative investment fund manager (AIFM) within the meaning of the Act.

Additionally, in respect of the Equity Model or Lending Model (as presented in the above), the question is whether the investment decisions are made on behalf the investor or by the investor. In the event that the platform makes the investment decisions, there would be an AIF and the Crowdfunding Platform could be seen as an AIFM. It would also seem that since the Donations or Rewards Model do not entail an element of collective invest policy, there is not AIF or AIFM.

4 Conclusion

At present, there is no regulatory regime specially adapted to Crowdfunding in Finland. Since the existing Finnish legislation (e.g. Act on Credit Institutions, Act on Investment Services, Securities Markets Act and Consumer Protection Act) covers also Crowdfunding activities, the Finnish legislator seems to be waiting for the European Commission's initiative and the development of the Crowdfunding market in Finland before starting any legislative motions. The current expectation is that rather than imposing new legislation, the regulator will guide the market towards self-regulation or other soft-law solutions. At the time of writing, there are no ongoing legislative or self-regulatory processes in Finland.

In respect of the AIFs, it must be noted that since Crowdfunding had not yet been profoundly established in Finland at the time of publication of the Draft Proposal for implementing the AIFM Directive in Finland as well as the fact that it may be conducted in various manners, it is somewhat difficult to assess, whether some Crowdfunding activities would fall within the scope of the Finnish Act on Alternative Fund Managers. However, it would seem that especially Equity Model and Lending Model Crowdfunding could fulfill the requirements of the Act when the investment decisions are made by the Crowdfunding platform providers according to a pre-agreed investment schemes.

Currently Crowdfunding works well in Finland's market, especially when the platform provider benefits from statutory exemptions regarding licensing and prospectus requirements, and provided that the financing is carefully planned. Even though there are only a few successful Crowdfunding projects at present in Finland but the number continues to increase at a fierce speed. One bump in the road seems to be the National Police Board's interpretation of the Fundraising Act. For this reason, foreign methods of conducting Crowdfunding projects cannot be directly copied in Finland.



5 Contact details of the authors:

Janne Lauha
Partner
janne.lauha@castren.fi



Marianne Luotio
Associate
marianne.luotio@castren.fi



Lasse Vuola
Senior Associate
lasse.vuola@castren.fi



Castrén & Snellman Attorneys Ltd
Eteläesplanadi 14
00130 Helsinki
Finland

Tel +358 (0)20 7765 765
www.castren.fi



CASTRÉN & SNELLMAN



FRANCE



1 Current Market of Crowdfunding platforms in France

In France enthusiasm for Crowdfunding (known as *financement participatif*) is high and has resulted in a proliferation of dedicated websites and substantial amounts raised, but, as is the case in other jurisdictions, regulatory restraints may apply to Crowdfunding activities.

French Crowdfunding platforms are organised on the same models as are found elsewhere, focused on generating equity investments, loans or donations. These platforms are potentially subject to several different regulatory regimes, including:

- rules regarding intermediation, solicitation and distance selling, whatever model is used by the platform;
- banking regulation, when the requested funding takes the form of a loan;
- securities regulation, when equity investments (or investments in debt securities) are sought;
- regulation of payment services, when funds are paid in through the crowdfunding platform;

and potentially other regulatory regimes, including those relating to anti-money laundering, combatting the financing of terrorism and sanctions (“AML/CFT/sanctions”).

1.1 Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Examples of French platforms engaged in Crowdfunding through offers of equity include the following:

- Anaxago, which promotes crowdfunding offers of up to €2.5 million per issuer (accepting a minimum of €1,000 per investor).¹⁹
- Finance Utile proposes equity investments (with a minimum of €1,500 per investor) in small companies with high growth potential.²⁰
- SmartAngels, dedicated to investment in start-ups and SMEs.²¹
- WiSEED, supporting projects raising up to €100,000, via investments of not less than €100 per investor, and also projects funded by less than 150 non-qualified investors.²²

¹⁹ www.anaxago.com/

²⁰ www.financeutile.com

²¹ www.smartangels.fr

²² www.wiseed.fr

1.2 Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Examples of French platforms engaged in Crowdfunding for business activities through loans include the following:

- Babyloan, which promotes micro-loans for entrepreneurs from developing countries.²³ Participants provide reimbursable loans without interest (and for that reason the loans are said not to be subject to the French banking monopoly).
- FriendsClear, which promotes loans among businesses. The loans are provided by the Crédit Agricole; FriendsClear has a status of a banking intermediary (intermédiaire en opérations de banque et en services de paiement, described below).²⁴
- SPEAR, which promotes loans to projects with an ecological, cultural and social impact.²⁵ Participants place funds in the SPEAR cooperative association, at a low interest rate. Funds collected are deposited by SPEAR in one of its partner banks, which grants loans to the projects chosen by the participants.

Another major French lending platform is Prêt d'Union,²⁶ which promotes consumer credit rather than loans for business activities.

1.3 The Donations/Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

French platforms promoting donations, including in some cases with financial returns or other rewards, include (among others):

- KissKissBankBank, dedicated to financing artistic and other projects of many sorts (performers, photographers, writers, travel, etc.).²⁷
- My Major Company, which solicits financing for a broad range of performers and other projects with a cultural element.²⁸

2 Current regulation of Crowdfunding platforms in France

2.1 Regulation of financial intermediation

Services as a broker for securities transactions (including reception and transmission orders for third parties or execution of orders for third parties), underwriting securities offerings and certain other activities relating to securities or other financial instruments can be carried out in France only by an authorised French or EEA-passported "investment service provider" (*prestataire de services*

²³ www.babyloan.org/fr/ as of March 12, 2013

²⁴ www.friendsclear.com/ as of March 22, 2013

²⁵ www.spear.fr/ as of March 12, 2013

²⁶ www.pret-dunion.fr/

²⁷ www.kisskissbankbank.com/ as of March 25, 2013

²⁸ www.mymajorcompany.com/ as of March 25, 2013

d'investissement),²⁹ licensing requirements for which are extensive (including minimum capital of €125,000 if client funds are accepted and €50,000 if they are not; or €750,000 for certain underwriting activities). Crowdfunding platforms in France generally do not engage in such activities, and so should not be required to register as an investment service provider.

However, a less onerous licensing regime applies to persons providing advice on a regular basis regarding investments and certain related matters, which can be performed in France by a French or EEA-authorised financial investment adviser (*conseiller en investissements financiers*).³⁰ French Crowdfunding organisations such as WiSEED, Anaxago, Finance Utile and SmartAngels report that they are registered as financial investment advisers, since their activities consist of advice on providing financing.

Further, acting (for consideration) as an intermediary with respect to banking operations or payment services requires registration as an *intermédiaire en opérations de banque et en services de paiement* ("IOBSP").³¹ Several French Lending-Model platforms have registered as IOBSPs.

The foregoing rules apply to any intermediaries or advisers who carry out their activities in France, including foreign entities which can be deemed to conduct such activities in France via the internet. Whether the rules will apply in a given case is subject to a fact-based analysis. Guidelines on the subject have been published by the Autorité de Contrôle Prudentiel et de Résolution ("ACPR").³²

2.2 Regulation of lending activity

Any lending activity in France, if conducted "habitually" and for profit (*à titre onéreux*), is a credit operation subject to the French banking monopoly, which can be carried out only by French or "passport" EEA credit establishments.³³ In case of violation, administrative and penal sanctions may be imposed, but the relevant loan agreements should not thereby be voided. These rules are enforced by the ACPR.

Loans granted without interest or other consideration are not subject to the banking monopoly. The ACPR has announced that, subject to court review on a case-by-case basis, interest-free loans for which the lender receives a promotional reward of small value (such as a CD, DVD or concert ticket) seem likely to be considered interest-free.³⁴

To avoid violation of banking monopoly rules, some French Crowdfunding organisations arrange for the actual loans to be made by authorised banks, with the Crowdfunding organisation acting as an IOBSP.

²⁹ CMF article L.531-1 et seq.

³⁰ CMF articles L.541-1 et seq.

³¹ CMF articles L.519-1 et seq.

³² AMF/ACP Guide May 2013

³³ CMF articles L.311-1, L.313-1 & L.511-5

³⁴ AMF/ACP, Guide du financement participatif (crowdfunding) à destination des plates-formes et des porteurs d projet (May 14, 2013) ("AMF/ACP Guide May 2013").

There are exceptions to the banking monopoly for various lending activities by non-profit organisations.³⁵ Such organisations are also permitted to make profit-participation loans under certain conditions.³⁶

If consumers are permitted to borrow via a platform following the Lending Model, consumer-protection rules will apply, including (among others) rules as to required documentation and a cooling-off period during which the borrower can withdraw from the transaction.

2.3 Regulation of payment services

Under French law any person providing payment services must be licensed as a payment institution (*établissement de paiement*)³⁷ consistent with the Payment Services Directive 2007/64 of 13 November 2007. However, exemptions from the licensing requirement may be obtained by a filing with banking/insurance regulator, the ACPR, by platforms which accept payments from investors within a “limited network” or for a “limited range of goods or services” or which collect donations in exchange for a definite and clearly defined counterpart having a value commensurate with the donation made.³⁸

Further, any person providing electronic money is regulated as an *établissement de monnaie électronique*,³⁹ consistent with the E-Money Directive 2009/110 of 16 September 2009. The ACPR considers that Crowdfunding platforms which arrange for funds for a given project to be collected in an account at a banking institution are “acquiring” and “executing” payment orders pursuant to CMF article L.314-1 II 3° and 5°, which activities require a licence as a payment service provider under CMF article L.522-6.

2.4 Prospectus regulation

2.4.1 General rule

The public offering rules in France comply with the general EU framework set out in the prospectus directive 2010/73 of November 4, 2003 (as amended) but with features specific to France. Making a public offering in France requires among other things the preparation of a prospectus approved by the securities regulator, the Autorité des Marchés Financiers (“AMF”), or the securities regulators of another EEA member state.

These French rules on public offerings, and exemptions thereto (see below), apply to offers of securities in France regardless of where the issuer is situated. With respect to offerings made over the internet, the offering is considered made in France, and thus becomes subject to these French rules, if French investors are targeted in some manner (for example, when the site is in French and is linked to sites of French organisations).

³⁵ CMF article L.511-6 5.

³⁶ See CMF articles L.511-6 6 and 313-3 et seq.

³⁷ CMF article L.522-1

³⁸ AMF/ACP Guide May 14, 2013.

³⁹ CMF article L.526-1 et seq.

When considering the impact of these rules, a threshold question to ask is whether or not the transaction proposed by the Crowdfunding platform involves offering of a kind of security to which the public-offering rules apply, rather than distribution of some other instrument or investment, which may be subject to other regulatory obligations. The public-offering rules apply to offers of a financial security (*titre financier*), i.e. equity securities (shares or other securities giving access to equity or voting rights), debt securities (other than drafts or notes) or shares or interests in funds.⁴⁰

Those rules do not apply to distribution of other kinds of financial instruments (referred to as *contrats financiers*) including derivatives⁴¹ or to investments taking other forms (such as annuities or other contractual rights, which are referred to as *biens divers*⁴²). Consequently if a donation – even with a financial return – is structured so as not to be an investment in a financial security (*titre financier*), the offer thereof to the public can be considered not to fall within the ambit of public-offering rules. It is possible to ask the AMF for confirmation that a given Crowdfunding program is not subject to public-offering rules.

2.4.2 Exceptions/exemptions

Exemptions from general prospectus and registration requirements are available for private placements (addressed to qualified investors and to fewer than 150 other investors, for up to 20% of the issuer's pre-offer capital) or high-value placements (at least €100,000 per investor or €100,000 per security) and also for offerings of less than €100,000 in total or larger offerings representing up to 50% of the issuer's pre-offer capital and not exceeding €2.5 million if the securities are traded on a multilateral trading facility ("MTF")⁴³ or €5 million if not so traded.⁴⁴

Securities issued pursuant to one of these exemptions can nevertheless be publicly listed in France, if relevant listing requirements are met. One possible listing platform is Alternext (a unit of Euronext), which requires a minimum free float of €2.5 million. This means that an offering of between €2.5 million and €5.0 million, which represents not more than 50% of the issuer's pre-offer capital, can potentially be listed on Alternext and publicly traded thereon, with no prospectus required, as long as the free float is at least €2.5 million. Another potential trading platform for such an exempted offering is Alternativa, which is a MTF (so that to be eligible for the up-to-50%-of-capital exemption the offering should not exceed €2.5 million).

Of course, non-French Crowdfunding activities will benefit from the €100,000/50%-of-capital exemptions (among others), but when exemptions do not apply sanctions are potentially applicable if there is a basis to consider that the offering is made in France.

⁴⁰ CMF article L.211-1 II

⁴¹ CMF articles L.211-1 III and D.211-1 A

⁴² CMF article L.550-1 et seq.

⁴³ In French, a *système multilatéral de négociation* ("SMN").

⁴⁴ See *Code monétaire et financier* ("CMF"), article L.411-2, and AMF *Règlement Général* article 211-2. Amounts mentioned are cumulative amounts calculated over a period of 12 months. The limit of fewer than 150 non-qualified investors is calculated taking account of only investors located France. The exemption for offerings representing up to 50% of an issuer's capital is available for companies in the form of a *société anonyme* (a classic corporation) or a *société en commandite par actions* (a partnership limited by shares), but not those taking the form of a *société par actions simplifiée* (a simplified corporation).

2.5 Other applicable regulatory regimes

Other regulatory regimes potentially applicable to Crowdfunding activities include the following:

2.5.1 Regulation of marketing and distance selling

Marketing and distance-selling (including telephone and internet solicitation) are subject to restrictions on financial solicitation (*démarchage*) set out in the CMF and the Consumer Code.

The foregoing rules apply to any intermediaries or advisers who carry out their activities in France, including foreign entities which can be deemed to conduct such activities in France via the internet. Whether the rules will apply in a given case is subject to a fact-based analysis. Guidelines on the subject have been published by the ACPR.⁴⁵

French Crowdfunding organisations such as WiSEED, Anaxago, Finance Utile and SmartAngels report that they are registered as financial investment advisers.

2.5.2 AML/CFT/sanctions rules

Crowdfunding platforms may be required to comply with anti-money-laundering rules, requiring exercise of due diligence with regard to clients (*obligation de vigilance*), which consists of (i) identification of clients, (ii) gathering information relating to the purpose and nature of the transactions as planned and as carried out (among other things) and (iii) reporting suspicious transactions to French authorities (TRACFIN).⁴⁶ Although some French Crowdfunding organisations have reported difficulties in complying with anti-money-laundering rules, the need for compliance appears to have been accepted by most.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime

The AIFM Directive 2011/61 of 8 June 2011 in article 5(1) requires Member States to enact rules to ensure that every “alternative investment fund” (“AIF”) have a manager (an “AIFM”) responsible for ensuring compliance with rules set out in the directive. AIFs are defined in article 4(1)(a) as collective investment undertakings, other than UCITs, which “raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”. Under guidelines published by ESMA,⁴⁷ characteristics of such collective investment undertakings are that they (a) not have a general commercial or industrial purpose; (b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) allow unitholders or shareholders of the undertaking no day-to-day discretion or control.

⁴⁵ AMF/ACP Guide May 2013

⁴⁶ CMF, articles L.561-1 et seq.

⁴⁷ See ESMA, Final Report - Guidelines on key concepts of the AIFMD, 24 May 2013.

3.1 Status of AIFMD implementation

Under CFM articles L.214-24 et seq., transposing the AIFM Directive 2011/61 of 8 June 2011, every “alternative investment fund” (“AIF”) must have a manager (an “AIFM”) responsible for ensuring compliance with rules set out in legislation (essentially identical to those set out Directive 2011/61). AIFs are defined in CMF article L.214-24 as collective investment undertakings, other than UCITs, which “raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors”. Under guidelines published by ESMA, characteristics of such collective investment undertakings are that they (a) not have a general commercial or industrial purpose; (b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) allow unitholders or shareholders of the undertaking no day-to-day discretion or control.

3.2 Impact on Crowdfunding platforms

This legislation applies to Crowdfunding platforms only if they constitute collective investment undertakings in the sense described above, which would seem to require (among other things) that the funding take the form of either equity or loan; that the funding from Crowdfunding participants be collected by the platform, before being disbursed; that the investment in the supported company or project be maintained in the form of a collective investment, i.e. that the individual funders not have a direct investment relationship with the company or project in question.

The implementation of the AIFM Directive in France seems unlikely to impact Crowdfunding activities, since the criteria described above will generally not be met by operating companies or project companies seeking funding (since, among other things, they have a general commercial or industrial purpose) or Crowdfunding platforms (which generally do not pool capital from investors with a view to generating a pooled return for them).

4 Conclusion

Crowdfunding activists have called for several modifications of law and regulation intended to facilitate Crowdfunding. Measures proposed by Crowdfunding advocates include establishing a new category of intermediary for Crowdfunding operations, increasing above 150 persons the exemption for a “restricted circle” of investors, increasing from €100,000 to €1 million the threshold for application of public-offering rules and others.

On 30 September 2013 French officials proposed legislative reforms impacting Crowdfunding. The reforms are the subject of consultation, scheduled to end on 15 November 2013. The following is a summary of some key features of the proposed legislation:

- The legislation would create a new category of adviser, a conseiller en investissements participatifs (“CIP”), operating internet platforms offering equity and debt securities. The CIP will be subject to various requirements, including (among others) adherence to a code of conduct and establishing adequate management procedures. The internet site of the Crowdfunding platform must provide certain minimum information about the issuer, and must restrict access to investors registered with the site.



- The legislation would establish a new exemption for offers of equity and debt securities made exclusively through the internet site of a CIP, up to a maximum of €300,000 per issuer during any 12-month period.
- A new exemption would be made to the current lending monopoly, allowing interest-bearing loans from individuals to borrowers, up to a maximum of €250 per lender and a total of €300,000 for the borrower, provided that the loans are made collectively by more than 20 lenders.
- A new exemption would be provided to payment services rules, allowing Crowdfunding platforms (or other organisations) with a minimum capital of €40,000 to furnish payment services (i.e. collect and transmit funds), for amounts of up to €3 million per month. AML/CFT rules will remain applicable. This regime will apply only to payments within France, and will not give the payment service provider “passport” treatment in other EEA member states.

Many Crowdfunding advocates are submitting comments to French authorities suggesting that the new legislation be liberalised in various respects.

The new legislation is expected to come into force (perhaps with some changes from its proposed form) soon after the conclusion of the consultation.

5 Contact details of the authors:

Reid Feldman
Partner
rfeldman@kramerlevin.com



Kramer Levin Naftalis & Frankel LLP
47, Avenue Hoche
Paris 75008
France

Tel: +33 (0) 1 44 09 46 03
www.kramerlevin.com

KRAMER LEVIN
KRAMER LEVIN NAFTALIS & FRANKEL LLP



Expressing what Osborne Clarke is all about, is hard to put into words.

Worldwide, we're renowned for our **"Imaginative Thinking"**. Our clients benefit from the power of our ideas, something that we think sets us apart from the rest. What you may find different is the open but constructive way we treat our clients and employees, our relaxed but professional team work, or our impressive but versatile legal expertise and knowledge in seven challenging sectors. Either way, we're sure you'll find something different about our approach.

Discover what sets us apart at our site



osborneclarke.com or
contact us for a face-
to-face meeting – we
look forward to meeting
you!



Tanja Aschenbeck-Florange, LL.M. (San Francisco)
Partner, Tax Lawyer
T +49 221 5108 4104
E specialists@osborneclarke.de



GERMANY



1 Current Market of Crowdfunding platforms in Germany

In Germany, there are three broad types of Crowdfunding:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Currently there are two main kinds of Crowdfunding platforms in Germany offering the Equity Model:

- First, platforms without any kind of licence – they are only active in the business of investment broking and/or contract broking mainly regarding silent partnerships. They operate outside the prospectus regime and must therefore comply with the very limited exemptions. The sole exemption that comes into consideration is that the offering of investments does not exceed EUR 100,000 during 12 months.
- Second, two Crowdfunding platforms currently operate within the scope of regulation (both with different approaches).

One simply offers securities. Therefore all companies seeking funding ("entrepreneurs") must transform to a (private) stock corporation first. This platform also offers a trade market for the securities. They have a licence for financial services under the German Banking Act (*Kreditwesengesetz*).

The other platform is more complicated and is structured similar to a fund. It does not have a licence, but has prepared an approved prospectus for the platform. They offer silent partnerships.

In summary, the most common and simple way of Equity Crowdfunding in Germany is to only broker silent partnerships. The use of a license (that enables the platform to offer additional services) is very rare in Germany.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Recently Crowdfunding platforms are emerging which broker only subordinated loans (*Nachrangdarlehen*). In order to let the investors participate in the success of the funded project or company the interests are linked to the profit of the project or company. However, the investor does not share liability for any losses.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In Germany the Donations or Rewards Models are used predominantly to finance social or creative projects or companies (e.g. NGOs). No financial investment or return is involved. Investors fund

projects or companies and get no return at all or a non-monetary reward (e.g. tickets, CDs etc.). In some cases the rewards are of a symbolic value only.

2 Current Regulation of Crowdfunding platforms in Germany

2.1 Licence under the German Banking Act (*Kreditwesengesetz*)

2.1.1 Equity Model

General Rule

Pursuant to the German Banking Act (*Kreditwesengesetz*), anyone intending to provide financial services in Germany commercially or on a scale which requires a commercially organised business undertaking requires a written licence from the German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – "BaFin").

The provision of "financial services" includes the brokering of business involving the purchase and sale of financial instruments or their documentation (investment broking), the purchase and sale of financial instruments in the name of and for the account of others (contract broking) and the placement of financial instruments without commitment to take up those instruments (placement of financial instruments).

"Financial instruments" within the meaning of the German Banking Act (*Kreditwesengesetz*) include securities, investment products (*Vermögensanlagen*) and shares in collective investment undertakings (*Investmentvermögen*).

Securities include shares in stock corporations as well as debt securities including participation certificates. Investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagengesetz*) comprise, inter alia, shares in other legal entities (such as limited liability companies, limited partnerships, civil law partnerships or silent partnerships (*stille Beteiligungen*)), participation rights (*Genussrechte*) with regard to profits in those legal entities, shares in trust assets and registered bonds.

Shares in collective investment undertakings (*Investmentvermögen*) were added in the context of the implementation of the European Alternative Investment Fund Managers Directive ("AIFMD") in Germany. For details see section 3 below.

In summary, where an online Crowdfunding platform facilitates the offering of securities, investment products (*Vermögensanlagen*) or shares in collective investment undertakings (*Investmentvermögen*), the operator of the platform provides financial services within the meaning of the German Banking Act (*Kreditwesengesetz*) and therefore, as a general rule, requires a licence by BaFin.

Exemptions from licensing requirement

If securities (such as shares in stock corporations or limited liability companies) are offered, no exemptions are available from the licensing requirement.

However, as stated above – and as described by BaFin in its article on "Crowdfunding and supervisory law" dated 12 September 2012 – most German Crowdfunding platforms offer interests in silent partnerships and can therefore benefit from a statutory exception to the licensing requirement.

The following requirements must be met:

- only investment broking and contract broking are conducted,
- only investment products (*Vermögensanlagen*) within the meaning of the Investment Products Act (*Vermögensanlagegesetz*) (which includes silent partnerships) or shares collective investment undertakings (*Investmentvermögen*) are offered;
- no acquiring of ownership or possession with regard to funds or shares of customers (unless a specific license to do so has been obtained).

Where these requirements are met, the operator needs only obtain a licence under the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*) (which is a relatively straightforward matter).

Making use of this exception comes with certain disadvantages. For example, investment products (*Vermögensanlagen*) are rarely tradable.

2.1.2 Lending Model

Depending on the structure in detail subordinated loans (*Nachrangdarlehen*) are considered as "debt" (in contrast to equity) and do not qualify as shares in collective investment undertakings (*Investmentvermögen*) or investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagegesetz*).

Brokering of such subordinated loans (*Nachrangdarlehen*) only requires a straightforward licence under the German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*).

2.1.3 Donations or Rewards Model

Depending on the structure in detail there are good reasons to state that these kinds of investments do not qualify as shares in collective investment undertakings (*Investmentvermögen*) or investment products (*Vermögensanlagen*). Therefore, it should fall outside of German financial services regulation.

2.2 License under the German Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*)

In addition to the requirements set out above, any transfer of funds through the operator of a Crowdfunding platform will generally constitute money remittance services within the meaning of the German Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*). Such transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur.

Although the platform operator may conceivably rely on the exemption for commercial agents under the German Payment Services Act (*Zahlungsdiensteaufsichtsgesetz*), recent BaFin decisions have

shown that the German supervisory authority only permits a very limited application of this exemption.

As an alternative – in order to avoid such licensing requirements – the operator of a Crowdfunding platform could use an external provider or partner for processing payments rather than acting as an intermediary himself. However, even in this case the structure should be coordinated in cooperation with BaFin.

2.3 Prospectus requirements

General rule

Entrepreneurs issuing securities or investment products (*Vermögensanlagen*) to investors can be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by BaFin under the German Securities Prospectus Act (*Wertpapierprospektgesetz*) where securities are offered (e.g. shares in stock corporations) or under the German Investment Products Act (*Vermögensanlagengesetz*) where investment products (*Vermögensanlagen*) are offered (e.g. silent partnerships).

The operator of a Crowdfunding platform is normally not subject to such a prospectus requirement since it will not be responsible for the "offering".

Depending on the structure, subordinated loans (*Nachrangdarlehen*) do not generally constitute investment products (*Vermögensanlagen*) under the German Investment Products Act (*Vermögensanlagengesetz*) and therefore no prospectus is required. The same should apply to investments where individuals provide money to a company or project for benevolent reasons or for a non-monetary reward (Donations or Rewards Model).

Exceptions from prospectus requirement

The general prospectus requirement does not apply where the offering of securities or investment products (*Vermögensanlagen*) does not exceed EUR 100,000 within a time period of 12 months. This applies to the issuing of securities as well as the issuing of investment products (*Vermögensanlagen*).

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- German Trade, Commerce and Industry Regulation Act (*Gewerbeordnung*);
- German Act on Money Laundering (*Geldwäschegesetz*);
- German Securities Trading Act (*Wertpapierhandelsgesetz*);
- Consumer Credit Regulation (*Vorschriften für Verbraucherdarlehensverträge*).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Germany

3.1 Status of AIFMD implementation

Germany implemented the European Alternative Investment Fund Managers Directive ("AIFMD") on 22 July 2013.

As usual, in Germany this implementation has gone much further than merely transposing the Directive into German law, imposing additional requirements to those required by the Directive ("gold plating").

The act implementing the European directive into German law includes a Capital Investment Act (*Kapitalanlagengesetzbuch*) which is intended to regulate all German fund structures and all fund managers.

3.2 Definition of an alternative investment fund ("AIF")

According to the Capital Investment Act the extensive AIFMD regulation of funds and fund managers applies when there is an alternative investment fund ("AIF") managed by an alternative investment fund manager ("AIFM").

Therefore, it is crucial to the impact of the national AIFMD regulations on Crowdfunding whether any of the participants qualifies as an AIF or an AIFM.

The Capital Investment Act provides that AIFs include a collective investment undertaking which:

- raises capital from a number of investors,
- with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- is not an operating company conducting business outside the financial sector and
- do not require authorisation pursuant to Article 5 of Directive 2009/65/EC (UCITS).

With regard to the requirement that the investment undertaking is not an operating company, the European Securities and Markets Authority (ESMA) in its consultation paper on "Guidelines on key concepts of the AIFMD" published 19 December 2012 ("ESMA Consultation Paper") considers that *"an ordinary company with general commercial purpose should not be considered a collective investment undertaking"*.

BaFin further clarifies the term *operating company* in its interpretation guideline on the "Scope of application of KAGB / Interpretation of the term collective investment undertaking" dated 14 June 2013 ("BaFin Interpretation Guideline"). In this Interpretation Guideline BaFin considers companies as *operating companies* if they *operate the facility or production themselves within their day-to-day business*. However, BaFin states in its Interpretation Guideline that an operating company can make use of the service of an intra-group company or an external service provider, as long as the day-to-day discretion remains at the company.

3.2.1 Operating company seeking funding

As stated above, German AIFMD regulation does not apply to *operating companies outside the financial sector* which do not *invest in accordance with a defined investment policy*.

In light of the BaFin Interpretation Guideline, companies seeking funding by means of a Crowdfunding platform could only be *operating companies outside the financial sector* if:

- their business strategy is simply the commercial success of their business;
- they do not intend to follow any defined investment policy but want to finance their on-going day-to-day business; and
- they operate the facility, production or project themselves within their day-to-day business or make use of the service of an intra-group company or an external service provider (as long as the day-to-day discretion remains at the company)

In general, these requirements are met by the "typical" start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform. Such companies should therefore fall outside the scope of the German AIFMD regulation.

3.2.2 Project Company seeking funding

3.2.2.1 Equity Model

On the other hand, the BaFin Interpretation Guideline illustrates that companies cannot qualify as *operating companies* if they are established to finance a single project ("Project Company") such as a movie, a computer game, a wind farm or a solar park, and do not operate the facility or production themselves or by means of an outsourcing company leaving the day-to-day discretion to the "Project Companies".

Accordingly, this kind of "Project Company" might constitute an AIF within the meaning of the German AIFMD regulation if it seeks funding in return for a share in the profits or revenue generated by the project.

3.2.2.2 Lending Model

A subordinated loan (*Nachrangdarlehen*) should generally be capable of being structured as a non-AIF investment as – according to the BaFin Interpretation Guideline – the subordination clause does not cause liability for the losses of the project/company for the investor.

3.2.2.3 Donations or Rewards Model

Some of the Project Companies do not offer any kind of revenue but instead (often small) non-financial rewards in return. In the latter case (e.g. if the promised reward is a ticket or a copy of the movie or game) it can be argued that the funds are not invested *for the benefit of those investors* and the funding therefore contains no collective investment undertaking and no AIF. BaFin has not yet commented on a possible application to Rewards-based Crowdfunding.



3.2.3 Crowdfunding Platform

As a general rule the operator of a Crowdfunding platform does not raise capital from investors for its own business. Therefore, the operator of the Crowdfunding platform should not qualify as an AIF.

However, in any case – even if the underlying investment (e.g. a Project Company) qualifies as an AIF – there are sound arguments to state that the Crowdfunding platform does not "manage" this underlying investment. Instead the Crowdfunding platform merely arranges investment into it. The Manager of the AIF is typically the company seeking funding by means of the Crowdfunding platform.

As a conclusion, there are sound arguments that the Crowdfunding platform should not qualify as an AIFM.

4 Conclusion

In conclusion, Crowdfunding is already regulated extensively in Germany. In particular the prospectus requirements in respect of each funding over EUR 100,000 are very strict in comparison with other European jurisdictions.

The application of the AIFMD regime to companies seeking funds by means of Crowdfunding platforms (which appears likely if they are Project Companies) would make any attractive cost-reward ratio impossible. Projects like movies or games are likely to be excluded completely since they do not qualify as "material assets" (*Sachwerte*) within the meaning of the Capital Investment Act.

These strict regulations contradict the explicitly stated intention of the European Commission to support Crowdfunding. A large proportion of possible Crowdfunding projects could be rendered impossible in the future. Therefore, BaFin should explicitly exclude Crowdfunding from any possible application of the AIFMD regime.



5 Contact details of the authors:

Tanja Aschenbeck-Florange, LL.M.
Partner
tanja.aschenbeck@osborneclarke.de



Thomas Nagel
Lawyer
thomas.nagel@osborneclarke.de



Osborne Clarke
Innere Kanalstr. 15
50823 Köln
Germany

T: +49 (0) 221 5108 4104
www.osborneclarke.com





GREECE



1 Current Market of Crowdfunding platforms in Greece

In Greece, there are currently two (2) types of Crowdfunding:

1.1 **The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)**

One platform based on the Equity Model operates in Greece, soliciting investments in renewable energy sources companies and projects under the exemption for the offers of securities which do not exceed EUR 100,000 during twelve (12) months, but the Hellenic Capital Markets Commission ("CMC") has raised doubts about the legality of the platform's operations, having issued on 1 August 2013 a press release informing the investors that the platform has not obtained the CMC's permission for soliciting investments of the public in any kind of debt instruments or investment programs and that further investigations are currently under progress.

The operation of another platform offering the Equity Model, known as StartersFund is currently under way. StartersFund is a platform intended to support projects which require equity funding for the promotion and development of their business activities, with a primary focus in the fields of new technologies, renewable energy sources and tourism. The platform is currently inactive and the intention of the founders is for the platform to operate in cooperation with an investment firm making benefit of the relevant license for the provision of investment services.

1.2 **The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)**

According to information currently available, the Lending Model is not offered in Greece.

1.3 **The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)**

There are few Crowdfunding platforms operating in Greece under the Donation or Rewards Model. The most known platform, operating since May 2012 is Groopio, which aims at pooling funds for social or creative projects, artists, performers as well as non-profit organizations that seek financing and other support. The investors fund projects of their preference either for the moral satisfaction and without getting anything in return or in order to receive the non-monetary reward that a project may offer, which may vary from a thank you note to small gifts of symbolic value such as tickets, t-shirts, or even a home-cooked meal.

2 Current Regulation of Crowdfunding platforms in Greece

2.1 Financial Services license requirements

2.1.1 Equity Model

According to Law 3606/2007 implementing in Greece Directive 2004/39/ EC (“MiFID”), the offering of investment services and the performance of investment activities in Greece, in a professional capacity, is allowed in principle to investment firms licensed in Greece by the CMC or to investment firms from other European Union countries having the benefit of the European “passport” (i.e. following the notification procedure) to offer services either through a branch or on a cross-border basis without an establishment in Greece.

The provision of investment services includes, inter alia, the receipt, transmission and execution of orders on behalf of clients for performing transactions in financial instruments, the placement of financial instruments without commitment to take up those instruments and the provision of investment advice.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment funds, options, futures, swaps, futures and other derivatives.

Where a Crowdfunding platform facilitates the offering of securities to the public and/or provides advice to investors on investment in securities, the operator of the platform may be considered to be providing the investment services of placing of financial instruments and/or investment advice, services which require the license by the CMC. However, at this writing (20 September 2013) the CMC has not yet expressed its position officially with respect to the possible unauthorized provision of investment services by the only Crowdfunding platform mentioned above allegedly operating under the Equity Model in Greece.

2.1.2 Lending Model

Although the Lending Model is not currently offered in Greece, the general rule is that according to Law 3601/2007 (implementing in Greek legislation EU Council Directives 2006/48/EC and 2006/29), the provision of loans or other credits, in a professional capacity, is allowed only to credit institutions and certain financial institutions (i.e. credit companies) licensed by the Bank of Greece (“BoG”), or alternatively to credit institutions and certain financial institutions established in other European Union (EU) countries having the benefit of the European “passport” to offer services either through a branch or on a cross-border basis without establishment in Greece.

2.1.3 Donations or Rewards Model

The structure of the Donations or Rewards Model is based on non-monetary returns/giveaways to the investors or on no return at all and no investment is involved. Based on said structure, the platforms operating this model may not be considered to be offering investment or banking services and thus fall outside the scope of the relevant regulations.

2.2 License under the Payment Services Directive

As a general rule, any transfer of funds made by the operators of Crowdfunding platforms to the companies/projects could constitute money remittance services within the meaning of law 3862/2010 implementing Directive 2007/64/EC on payment services. Such transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur.

The provision of payment services in Greece is a regulated activity that may only be undertaken by specific categories of service providers, which are subject to prudential supervision, such as banks, e-money institutions, payment institutions etc. Companies which provide payment services in Greece are required either to be licensed as payment services providers by the BoG or to be duly passported (i.e. operating through a Greek branch or on a cross-border basis).

It is not clear whether the platform operator could rely on the exemption for commercial agents under point b) of article 3 of Law 3862/2010. The applicability of such exemption should be confirmed with the BoG on an ad hoc basis.

As an alternative – in order to avoid such licensing requirements – the operator of a Crowdfunding platform could use an external provider or partner for processing payments rather than acting as an intermediary itself. However, even in this case the structure should be coordinated in cooperation with BoG.

2.3 Prospectus requirements

Law 3401/2005, as currently in force, implementing in Greece Directive 2003/71/EC (the “Prospectus Directive” as amended by Directive 2010/73/EE), provides that the public offering of securities in Greece requires the prior publication of a prospectus, which must be approved by the CMC.

There is an exemption from the obligation to publish a prospectus for securities offerings with total value of less than Euro 100,000 within a time period of twelve (12) months. This is the exemption that the Crowdfunding platforms of the Equity Model may try to use for offerings of securities. However, the application of this exemption has not been tested in practice with respect to Crowdfunding platforms and it certainly does not extend to offers of investments which do not qualify as “securities”, within the meaning of Law 3401/2005, as currently in force.⁴⁸ Thus, offerings of participations in investments which do not qualify as “securities” may not benefit from the

⁴⁸ According to Law 3401/2005, securities include transferable securities as defined in Law 3606/2007 (that is, those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitized debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures) as well as money market instruments as defined in Law 3606/2007 (which include those classes of instruments which are normally negotiable on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment), both having a maturity of more than 12 months.

aforementioned exemption. Offerings of investment products which do not qualify as “securities” under Law 3401/2005 are not subject to the provisions of Law 3401/2005 but rather to the provision of Article 10 Law 876/1979.

Specifically, Article 10 Law 876/1979 establishes a more general rule with respect to the approval that must be granted by the CMC in all cases where persons aim to induce the public for investing in any kind of instruments and provides that it is prohibited “to perform in any way whatsoever advertisements, notifications, declarations or announcements to the public aiming at attracting the public for investing money in any kind of debt instruments as well as the collections of savings from the public for participating in any kind of investment, unless a special permission has been granted by the CMC”.

Until the recent amendment of Law 3401/2005 by Law 4099/2012, the offers of securities which were exempted from the obligation to publish a prospectus were also explicitly exempted from the obligation to take the permission of the CMC under Article 10 of Law 876/1979, but this is no longer the case following the recent amendment of Article 3 Law 3401/2005. Thus, the new text of the law has created an uncertainty as to the exact scope of application of the provision of Article 10 Law 876/1979. Nevertheless, in our view, since Article 3 of Law 3401/2005 which exempts certain offers of securities from the prospectus publishing requirement is subsequent to Law 876/1979, more specific than Article 10 of the latter law and transposes the respective provisions of the relevant Directive in Greece, the correct interpretation of Article 3 Law 3401/2005 and Article 10 Law 876/1979 is that the offers of securities which are exempted from the prospectus publishing requirement (such as the offers with a total value of less than Euro 100,000 within twelve (12) months) should be also exempted from any licensing requirement, including the permission of the CMC under Article 10 Law 876/1979, whereas the offers of investment products which do not qualify as “securities” under Law 3401/2005 should be subject to the provision of Article 10 Law 876/1979.

The CMC has not officially expressed its view on the matter yet, although its press release of 1 August 2013 mentioned above stating that a Crowdfunding platform had not obtained permission under Article 10 Law 876/1979 for soliciting investments from the public in any kind of debt instruments or investment programs suggests that at least the operations of that platform require permission from the CMC.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Law 3691/2008 on money laundering prevention;
- Laws 2472/1997 and 3471/2006 on data protection;
- Law 2251/1994 on consumer protection and sales performed from a distance;
- Law 2121/1993 on intellectual property;
- Law 3862/2010 on payment services

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Greece

3.1 Status of AIFMD implementation

All EU member states must implement the Alternative Investment Fund Management Directive (the "AIFMD") before July 22, 2013.

In Greece, a draft law was submitted to public consultation on 29 July 2013 but no draft law has been submitted to Parliament for voting yet.

3.2 Definition of an Alternative Investment Fund ("AIF")

According to Article 4 of the proposed law for the implementation of the AIFMD (and pursuant to Article 4 of the AIFMD), an AIF is defined as any collective investment undertaking, including investment compartments thereof, which:

- (i) raises capital from investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (ii) does not require authorisation pursuant to Article 4 of Law 4099/2012 on UCITS or pursuant to Article 5 of Directive 2009/65/EC (UCITS).

3.3 Crowdfunding platforms

If the legislation implementing AIFMD adopts the aforementioned definition of AIF, Crowdfunding platforms could be subject to the provisions of the law implementing AIFMD, if they qualify as collective investment undertakings which raise capital from investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors and are not UCITS.

4 Conclusion

Crowdfunding is in its infancy in Greece and there is currently no specific applicable regulatory regime. Operating the Equity Model, depending on its actual form, may be subject to certain regulatory requirements, including but not limited to Law 3606/2007 on the provision of investment services as well as to Law 3401/2005 for the public offers of securities or to the more general provision of Article 10 Law 876/1979 on the solicitation of the public to invest in any kind of investments. Operating the Donations or Rewards Models is not subject to any regulatory provisions whereas the Lending Model may be subject to the provisions, among others, of Law 3601/2007 regarding lending activities.



5 Contact details of the authors:

Nicholas L. Kontizas
Partner
n.kontizas@zeya.com



Zepos & Yannopoulos
75 Katehaki & Kifissias Avenue,
Athens 115 25
Greece

Tel: +30 210 6967000
www.zeya.com

Z E P O S & Y A N N O P O U L O S

Elena A. Papachristou
Senior Associate
e.papachristou@zeya.com



Ioanna N. Poulakou
Associate
i.poulakou@zeya.com





HUNGARY



1 Current Market of Crowdfunding platforms in Hungary

Currently, the Crowdfunding market is not very well-developed or sophisticated in Hungary. Neither the Lending Model, nor the Equity Model has a presence in Hungary yet.

There are few online platforms that use the Donations or Rewards Model in Hungary. Those online platforms collect and handle a relatively limited amount of funds.

2 Current Regulation of Crowdfunding platforms in Hungary

2.1 General Regulation of Crowdfunding platforms

2.1.1 The Equity Model

In this model, individuals make investments in return for a share in the profits or revenue generated by the company/project.

The Crowdfunding Equity Model does not yet have any presence in Hungary. The Equity Crowdfunding Model could be structured in various ways. Depending on the type of structure used by the platform operator, there could be various regulatory requirements applicable to the platform operator.

If the online Crowdfunding platform facilitates the offering of financial instruments, such activity of the platform operator is likely to qualify as a licensable investment service under the Hungarian Investment Services Act. "Financial instruments" under the Hungarian Investment Services Act include, inter alia, transferable securities, such as stocks in public limited companies and private limited companies and debt securities. Therefore, if the platform operator offers securities held in companies seeking Crowdfunding or bonds issued by such companies, such platform operators would very likely have to obtain an investment services licence from the Hungarian regulator.

Furthermore, structures in which the offering/placement of securities is involved would likely require the publication of the prospectus approved by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

If the online Crowdfunding platform is structured as a collective investment scheme it would be subject to regulatory requirements applicable to collective investment funds and their managers.

Furthermore, depending on the structure used by the Crowdfunding platform, Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Equity Model in Hungary.

However, we believe that a Crowdfunding platform using an Equity Model could be structured in a way which would possibly exclude the applicability of all or most of the Hungarian investment services regulatory requirements, investment funds regulatory requirements and prospectus publication requirements. Such platform could be structured by using civil law contractual arrangements and/or civil law partnership arrangements pursuant to which the individual investors, platform operators and crowdfunded businesses agree on, inter alia, the terms of the profit and loss sharing methods between the parties involved and the distribution of interest on the investments of the individual investors based on the civil law principle of contractual freedom.

2.1.2 The Lending Model

In this model, individuals lend money to a company or project in return for repayment of the loan capital, together with interest on the loan (if any).

The Crowdfunding Lending Model does not yet have any presence in Hungary. However, we have set out below certain regulatory requirements that an individual lender and/or platform operator applying a Lending Model could possibly face in Hungary.

Lending is a regulated financial service under the Hungarian Banking Act. Therefore, while structuring a platform applying the Lending Model in Hungary, careful consideration should be given to avoid any licensing requirements that could apply either to the individuals lending to the crowdfunded business or to the operating platform which acts as an intermediary in such lending structure.

Lending is licensable activity under Hungarian law only if it is a business activity carried out on a regular basis in the framework of an economic operation. The terms 'business activities carried out on regular basis' and 'economic operation' are not specifically defined under the Hungarian Banking Act. According to the Hungarian Financial Supervisory Authority (the "HFSA"), which will be merged into the Hungarian National Bank as of 1 October 2013, an activity qualifies as being performed in the framework of business activities carried out on regular basis if the activity is carried out on a regular basis, with the aim of entering into transactions that are not specified at the outset and with the aim of making a profit.

In general, individuals lending money to certain projects/business through Crowdfunding platforms do not provide funds on a regular basis with the aim of entering into transactions that are not specified at the outset. Furthermore, in most cases it is not the monetary return which is the most important driving factor for individuals when they provide loans to businesses through Crowdfunding platforms, even if a certain form of interest is payable on their loan. Therefore, taking into consideration the very nature of Crowdfunding, we believe that individuals lending money to a business through a Crowdfunding platform would not be considered as conducting a business activity on a regular basis as part of an economic operation. Therefore, we believe that the risk that the lending activity of the individuals qualifies as a licensable financial service and would require a financial service licence in Hungary, is rather low. However, the HFSA had historically followed a rather conservative approach as to the qualification of licensable financial services and in several cases qualified financial services as being conducted on a regular basis, even if the relevant transaction was only a one-off transaction. According to the public guidance of the HFSA, if the relevant entity expects future similar transactions to be realised at later dates and the entity takes

measures to fulfil such transactions on a regular basis, even a one-off transaction may qualify as an activity carried out on a regular basis. Therefore, it can not be absolutely excluded that a Hungarian platform using the Lending Model would trigger licensing requirements applicable to the individual lenders and/or the platform operators.

However, the Crowdfunding platforms using the Lending Model could possibly structure their services so as to eliminate or limit the risk of triggering Hungarian licensing requirements. For example, such models could stipulate that individuals do not receive interest on the loans provided to the crowdfunded business (thereby eliminating the profit oriented element), which would in turn limit the risk of triggering licensing requirements. Furthermore, the Crowdfunding platform could limit the number of the lending transactions that could be initiated by the individual. It may effectively limit the applicability of the regularity element of the activity which would, in turn, also limit the risk of triggering licensing requirements.

Furthermore, depending on the structure used by the Crowdfunding platform, the Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Lending Model in Hungary.

2.1.3 The Donations or Rewards Model

Under this model, individuals transfer money to an entity operating a platform to finance projects without any monetary reward. These platforms are mainly used in Hungary for financing creative projects, art and design projects. Although no monetary return is involved in such financing, in most cases, the company or person carrying out the project offers non-monetary rewards in return for the donations (e.g. a product sample, tickets).

In general, Donations or Rewards Models do not raise any specific Hungarian regulatory issue. However, depending on the structure used by the Crowdfunding platform, the Hungarian payment services requirements and custodial services requirements referred to in paragraph 2.2 below could also apply to platforms applying the Crowdfunding Donations or Rewards Model in Hungary.

2.2 Payment services and custodial services regulations

In general, the individuals transfer money to the platform operator and not directly to the crowdfunded businesses. The platform operator first collects the payments from the individuals and distributes such funds only if the aggregated amount of the payments reaches or exceeds a specific threshold limit, or upon the satisfaction of other specified financing criteria. Therefore, in such cases the platform operator acts as an intermediary which collects funds from individuals, holds such funds on escrow until the specified financing criteria are fulfilled and then transfers such funds to the crowdfunded businesses.

There is a risk that the collection and holding of such funds by platform operators on escrow may constitute a custodial service requiring a licence under the Hungarian Banking Act, provided it is carried out as a business activity on a regular basis as part of an economic operation. However, Crowdfunding platforms could possibly avoid licensing requirements if the platforms structure their activities so as to rely on exemptions from the relevant custodial services licensing requirements, or



by using an external financial institution or payment services provider for holding the amounts on escrow.

Once the financing criteria are fulfilled, the platform operator transfers the collected funds to the crowdfunded business. There is a risk that such transfer through the platform operator may qualify as a monetary remittance service and be subject to Hungarian payment services regulations, provided that it is carried out as a business activity on a regular basis as part of an economic operation. If so, the platform operator would require a licence from the Hungarian regulator to carry out payment services in Hungary. However, Crowdfunding platforms could possibly avoid payment services licensing requirements if they can rely on exemptions from the payment services licensing requirements (e.g. the commercial agent exemption) or by using an external financial institution or payment services provider for processing payments.

2.3 Prospectus requirements

Companies issuing securities to the public in Hungary might be subject to Hungarian prospectus requirements. According to the Hungarian Capital Markets Act, in such case a prospectus and a notice must be issued and approved by the competent Hungarian regulator.

However, in the case of Lending Model and Donations and Rewards Model a Crowdfunding platform operator is normally not subject to such a prospectus requirement since it will not be responsible for the offering/placement of securities.

However, in Equity Model Structures in which the platform operator is involved in the offering/placement of securities may require the publication of the prospectus/notice and approved by the Hungarian regulator in connection with such offering/placement, provided that no exemption is available under the Hungarian Capital Markets Act.

Such exemptions might be among other the following:

- (a) the offer of securities is addressed to fewer than 150 natural or legal persons in each Member State; and
- (b) an offer of securities where the a total consideration of securities in the European Union is less than EUR 100,000, which limit must be calculated over a period of 12 months.

However, even if an exemption is available, the offer/placement of securities in Hungary might constitute a private placement in Hungary triggering capital market requirements under the Hungarian Capital Markets Act (e.g. notification must be submitted to the Hungarian regulator, formality requirements applicable to the documents relating to the offer/placement).

2.4 Possible additional requirements

The platform operator may be subject to further Hungarian regulations, in particular:

- laws applicable to on-line marketing and contracts;
- anti money laundering laws;
- data privacy and data protection laws;

- consumer credit regulations;
- consumer protection regulations; and
- laws applicable to alternative investment funds (the laws necessary for the implementation of the applicable alternative investment funds directive have not yet been approved yet in Hungary).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Hungary

Despite the deadline applicable to the adoption and publication of national regulations implementing the provisions of the AIFMD, the Hungarian Parliament has not yet approved any of the laws necessary for the implementation of the AIFMD in Hungary. Therefore, as of the date of this report, we have no information on the possible implications of the AIFMD regime to the Hungarian regulations applicable to Crowdfunding.

4 Conclusion

There are only a few Crowdfunding platforms in Hungary and those which exist use the Donations or Rewards Model only. The Lending Model and the Equity Model currently have no presence in Hungary.

There is no regulatory regime adapted to Crowdfunding in Hungary. However, depending on the structure used by the relevant platform operator, both the Lending Model and the Equity Model might trigger regulatory requirements in Hungary, including, inter alia, financial services requirements, investment services requirements, prospectus requirements and payment services requirements. Nevertheless, we believe the platform operators seeking to intermediate Crowdfunding based on the Equity Model or the Lending Model could possibly structure their activities and business terms so as to limit and or eliminate the risk of triggering Hungarian licensing requirements.

We believe the Donations or Rewards model is generally exempted from the Hungarian regulatory requirements. However, depending on the structure used by the platform and service provided by the company, they might trigger payment services and custodial services requirements.

Given the above uncertainties of the Hungarian regulatory requirements with regard to the Crowdfunding activities, unless the relevant Hungarian laws and regulations are amended, we recommend to seek guidance from the Hungarian regulator on the interpretation of the relevant laws to clarify such ambiguities before using certain Crowdfunding methods and/or structures.



5 Contact details of the author:

Levente Hegedűs
Associate

levente.hegedus@kinstellar.com



Kinstellar
3 Széchenyi rkp
H-1054 Budapest
Hungary

Tel +3614284403
www.kinstellar.com

KINSTELLAR

IRELAND



1 Current Market of Crowdfunding platforms in Ireland

In Ireland, the following types of Crowdfunding are possible:

1.1 The Equity Model (individuals make investments in return for a share of the profits or revenue generated by the company/project)

Crowdfunding platforms in Ireland do not currently focus on the Equity Model though some do offer it as an option available to companies / projects seeking funding. Lending to corporates in Ireland is not a regulated activity whereas the regulatory regime for the Equity Model is not as straightforward. Offers need to fall within the exceptions in the Prospectus Directive as discussed below.

1.2 The Lending Model (individuals lend money to a company or a project in return for repayment of the loan and interest on their investment)

The Lending Model of Crowdfunding is the principal form of Crowdfunding currently being offered in Ireland. Lending to corporates is not a regulated activity in Ireland. The regulatory regime for lending focuses on lending to consumers. Under the Crowdfunding Lending Model a platform could fall within the meaning of “credit intermediary” set out in the Consumer Credit Act 1995 if it is deemed to be engaged in the business of arranging the provision of credit to a consumer. The Consumer Credit Act 1995 defines “consumer” as a natural person acting outside their business. It is feasible that a Crowdfunding platform could be engaged in the business of arranging credit for a project through a natural person rather than an incorporated body where that natural person’s involvement is outside his / her business. It should be noted that it is not particularly difficult to obtain authorisation as a credit intermediary under the Consumer Credit Act 1995. The process is more of a notification rather than an application for authorisation of a financial institution which is more onerous.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Rewards Crowdfunding is not currently regulated in Ireland, as it does not involve investment or lending. Crowdfunding has been discussed in parliament as an important future source of funding for charitable causes and community initiatives. However, there is no proposed legislation or regulation currently being considered.

It is worth noting that the credit union movement is particularly strong in Ireland. Credit unions are established for the purpose of providing low-cost credit to individuals who have a so-called “common bond” meaning a community connection usually based on a geographic area or workplace. A recently published Report of the Commission on Credit Unions suggested that credit unions be permitted to lend to small and medium sized enterprises and charitable / community initiatives within their

common bond. If these initiatives are adopted credit unions could prove to be a more structured alternative to Crowdfunding with respect to certain activities.

2 Current Regulation of Crowdfunding platforms in Ireland

2.1 Approval and licensing by the Central Bank

Irish law does not recognise or regulate Crowdfunding as a distinct means of raising finance.

A “banking business” requires an authorisation from the Central Bank of Ireland (“**Central Bank**”). The legislative definition of banking business is very broad but the Central Bank focusses on deposit taking as the essential banking business which triggers the requirement for authorisation. If an entity is not taking deposits, while it may be caught by other licensing requirements it will not be required to hold a bank licence.

It should be noted that section 7 of the Central Bank 1971 contains a broad prohibition on holding oneself out to be a banker. Section 7(2) provides that a person shall be deemed to hold himself out as a banker if, being a body corporate carrying on any business, the name of the body includes any of the words “bank”, “banker” or “banking” or any word which is a variant, derivative or translation of or is analogous to any of those words. Therefore, a Crowdfunding platform is limited in the scope of the names it can use and must avoid any name that may infer that it conducts banking business.

There are no financial services rules in Ireland designed specifically for Crowdfunding. However, when a company pitches to investors on a crowd-funding platform, such a pitch is typically considered an “offer to the public”. Equity Crowdfunding may be impacted by prospectus rules (as far as the issuer is concerned) and by financial promotion rules (as far as the issuer and platform are concerned).

2.2 Investment Services

It is illegal for a firm to “act as in investment firm, claim to be an investment firm or represent that the person is an investment firm in Ireland...” without the relevant authorisation/passport/exemption. An investment firm is a firm that provides investment services to third parties on a professional basis. Investment services under the Irish Regulations which implements the Markets in Financial Instruments Directive (the “MiFID Regulations”) are the same as those set out in Annex 1 of MiFID. The Investment Intermediaries Act 1995 (“**IIA**”) also regulates investment services and can apply to some activities not otherwise covered by MiFID. Investment advice is the most relevant IIA service in the case of Crowdfunding. Investment advice is regulated as an investment service under the IIA and MiFID, however, under the IIA advising a person on where they should get investment advice will itself constitute investment advice.

The reception and transmission of orders for financial instruments and the execution of orders on behalf of clients constitute “investment services” under the MiFID Regulations. The reception and transmission of orders for such instruments are core activities for Equity Crowdfunding. Such services can only be provided by authorised investment firms. The process of authorisation is expensive and lengthy, and the level of regulation and consumer protection is significant.

2.3 Prospectus Directive

The offering of securities to the public in Ireland is subject to the Prospectus Directive including the broad exemptions contained in that Directive. Note that the Prospectus Directive was a maximum harmonisation Directive and the Irish implementing regulations (SI No 324 of 2005) therefore one can assume that the Irish implementing regulations reflect the provisions of the Prospectus Directive itself.

Equity Crowdfunding may be impacted by prospectus rules (as far as the issuer is concerned) and by financial promotion rules (as far as the issuer and platform are concerned). An offer of securities to the public cannot be made without a prospectus, unless one of the exemptions is applicable. The preparation and approval process for a prospectus is incompatible with the nature and objectives of Crowdfunding. Failure to issue a prospectus when one is required is a criminal offence. Offers are exempt where the total consideration of securities offered within Ireland is less than €100,000 over a 12 month period.

2.4 Licence under the Payment Services Regulations

The business of money transmission is regulated by two statutes in Ireland, the first is the European Communities (Payment Services) Regulations 2009, Statutory Instrument No. 383 of 2009 (“**PSD Regulations**”) which implement the European Union’s Payment Services Directive, Directive 2007/64/EC (“PSD”). The PSD was a so called “maximum harmonisation” Directive, that the Member States were required to implement in total and were not permitted to either add additional requirements (so called gold plating) or provide for measures that are less than those set out in the PSD. We can confirm that Ireland’s implementation of the PSD through the PSD Regulations was consistent with this maximum harmonisation requirement and as such the PSD Regulations reflect very closely the requirements of the PSD itself.

Separately Part IV of the Central Bank Act, 1997 regulates a money transmission business which is defined as “... a business that comprises or includes providing a money transmission service to members of the public.” “Money Transmission Service” is defined as meaning a service that involves transmitting money by any means, other than such a service provided by a regulated entity or on an ancillary basis to other business conducted by an entity.

Therefore money transmission services which are not otherwise covered by the Payment Services Directive might be regulated by the Central Bank Act 1997 if they come with the definition of a “money transmission business”.

However, it is possible for Crowdfunding platforms to avoid the provision of payment services or money transmission in the course of their services, and so avoid the necessity for registration or authorisation under the PSD Regulations or the Central Bank Act 1997. The current Crowdfunding platforms operating in Ireland use the services of regulated payment service providers as the means through which a potential investor can transmit fund to a company / project. In this way the Crowdfunding platforms do not transmit the funds themselves and are not required to be regulated to provide payment services.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Ireland

The Alternative Investment Fund Managers Directive (“AIFMD”) was implemented in Ireland on 16 July 2013 and applies in effect from 22 July 2013. During implementation in Ireland no additional requirement (ie gold-plating) was added to the requirements set out in the AIFMD itself.

An AIFM is a legal person whose regular business is managing one or more alternative investment funds or “AIF”. An AIF is defined in Article 4(1) (a) as follows:

“AIF” means collective investment undertakings, including investment compartments thereof, which;

(i) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

(ii) do not require authorisation pursuant to Article 5 of Directive 2009/65/EC [the UCITS Directive]”

Given the above definitions, the provision of services relating to Crowdfunding is capable of constituting management of an AIF. However, there is an exemption in the AIFMD for managers with total assets under management of less than €100 million.

4 Conclusion

There is no legislation or regulations in Ireland which specifically deals with Crowdfunding. The financial regulation legislation in place is designed to regulate other business models. Therefore, Crowdfunding platforms need to ensure that they do not inadvertently provide a service which is regulated as part of legislation regulating, inter alia, investment services, banking business and / or payment services.

In Ireland, the lending activities of Crowdfunding platforms can be provided to corporates without any requirement for regulation provided the platform does not also provide investment services or payment services. A Crowdfunding platform may require authorisation as a credit intermediary if it is engaged in the business of arranging credit for consumers, being persons acting outside their business. Crowdfunding platforms cannot use the term “bank” or represent themselves as carrying on the business of banking. Equity Crowdfunding may come within the scope of the Prospective Directive and the AIFMD Regulations unless the exemptions set out above can be availed of.

The development of a Crowdfunding market and the regulation of Crowdfunding, in Ireland, are at a very early stage. However, given that the market is developing at a faster pace elsewhere in the European Union, and elsewhere, it would be timely for the EU Commission to propose legislation specific to this sector.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the authors:

Joe Beashel
Partner



Matheson
70 Sir John Rogerson's Quay
Dublin 2
Ireland

T: +353 1 232 2000
www.matheson.com



ISRAEL



1 Current market of Crowdfunding platforms in Israel

In Israel, there are three types of Crowdfunding, differentiated by the return received by the funders:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Currently, no law or regulations have been specifically enacted for Crowdfunding in Israel. The main legal consideration for Equity Crowdfunding platforms is the prospectus requirement (discussed below). Each Equity Crowdfunding platform in Israel must rely on specific exemptions from the prospectus requirement. A major platform currently operating relies on the "Qualified Client" exemption discussed below.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The main regulatory framework that applies to Crowdfunding lending services is the laws and regulations that govern lending and supply of credit in general. Loans to corporations may be viewed as securities and therefore be subject to prospectus requirement in Israel. Loans to individuals do not require a prospectus. Additional regulatory requirements are discussed below.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

This model is generally out of the scope of securities laws and no prospectus is required, as it does not involve acquisition of interest, profit sharing or any financial return. There are several platforms in Israel that operate Donations or Rewards Crowdfunding. The participants do not expect a financial profit. They receive either no return or a non-monetary reward that is not linked to the profit of the project (e.g. a copy of the book created with their support). Based on the operation of these platforms, they may not be subject to any regulation related to sale of equity or debt instruments. Consumer protection regulations may apply.

2 Current regulation of Crowdfunding platforms in Israel

2.1 Prospectus requirements

2.1.1 General Rule

Pursuant to the Israeli Securities Law, 5728 - 1968 (the "Securities Law"), offer of securities to the public in Israel requires a prospectus approved by the Israeli Securities Authority. An "offer" is defined in the Securities Law as any action intended to induce the public to purchase securities,

including, inter alia, any approach to the public to make offers to purchase securities. This is an intentionally wide definition. It should be noted that “Public” for Security Law purposes includes Israeli residents only.

2.1.2 Exemptions

The Securities Law and regulations promulgated thereunder include certain exemptions from the prospectus requirement. Such exemptions include, inter alia:

- a. Offering securities to no more than 35 investors during a 12 month period;
- b. Offering securities to certain types of sophisticated investors, including banks, mutual funds, investment managers, investment advisors, underwriters, VC funds, and large corporations;
- c. Offering securities to “Qualified Clients” that meet two of the following three criteria and have given their consent in advance to being considered Qualified Clients:
 - i. Have cash, deposits, financial assets and securities with total value exceeding NIS 12 million (approximately US\$ 3.5 million);
 - ii. Have capital market expertise;
 - iii. Performed at least 30 transactions per quarter, on average, in the past 4 quarters.
- d. Sale for up to NIS 2.6 million (approximately US\$ 750,000) for up to 5% of the outstanding capital of the issuer in each offering and 10% in the aggregate, for up to 75 investors.

It should be noted that the law does not specify in detail how, to what extent and by whom the qualifications of the potential investors, for the purpose of the exemptions, should be verified.

Therefore, under current regulatory framework, an unrestricted issuance of securities to the “crowd” using an internet platform, without prospectus, is not permitted.

2.1.3 Publication

According to the Securities Law, a publication of the intent to sell securities to no more than 35 investors (to be selected according to a defined procedure) or to certain sophisticated investors (See Section 2.1.2 b above) shall not be deemed an offering to the public and therefore does not require a prospectus. Subject to strict limitations, a Crowdfunding platform may be able to rely on this provision of the Securities Law in order to promote a proposed offering that will be later sold to a selected group of investors in compliance with the exemptions from the prospectus requirement. The content of the publication and any communication with potential investors should be carefully monitored.

2.2 License under the Banking Law (licensing), 5741 - 1981

Lending Model

Pursuant to the Banking Law, only a licensed bank may accept monetary deposits and provide credit. A Crowdfunding platform may claim that it does not directly accept deposits and provide credit as the loans are given directly from the lenders to the borrowers using the platform.

2.3 Privacy Protection Law, 5741 – 1981

Equity and Lending Models

A database owner in Israel is obligated to register his/her database in the official registry of databases under certain conditions. Registration is mandatory if a database contains "sensitive information" defined as "data on the personality, intimacy, health, financial situation, opinions and beliefs of a person". A Crowdfunding platform may hold sensitive financial information about its users, especially in the case of Crowdfunding lending, and therefore may need to register its database.

2.4 Regulation of Investment Advice, Investment Marketing and Investment Portfolio Management, 5755 – 1995

Equity and Lending Models

A license is required in order to provide investment advice in Israel. The question is whether a Crowdfunding platform that only provides a service that enables investment transactions, and does not provide any advice, information or analysis beyond the information provided by the issuers, shall be deemed as providing investment advice.

Lending Model

In connection with Crowdfunding lending, providing advice related to financial investments that are influenced by interest rate changes may require a license.

2.5 Regulation of Non-Banking Loans Law, 5753 - 1993

Lending Model

This law regulates the terms of loans given by entities other than banks, including disclosure requirements and terms of credit. This law may apply to lending Crowdfunding platforms, if it is determined that the platform is deemed a "lender" for the purpose of this law.

2.6 Credit Data Service Law, 5762 – 2002.

Lending Model

A license under this law may be required if the Crowdfunding platform collects, manages and stores credit data of borrowers and deliver such data to third parties.

2.7 License under the Payment Services Directive

Israel is not an EU member state and therefore the Payment Services Directive is not applicable.

2.8 Possible additional Regulations

Other laws to which the operator of a Crowdfunding platform may be subject include:

- Prohibition on Money Laundering Law, 5760 – 2000.
- Standard Contracts Law, 5743 – 1982.
- Consumer Protection Law, 5741 – 1981.

2.9 Proposed changes in the regulatory framework

Two initiatives are aimed at allowing equity Crowdfunding in Israel:

2.9.1 Interim Report of the Committee for the Promotion of Investments in R&D Public Companies dated June 4, 2013.

The report, focusing on increasing the accessibility of tech companies to Israel capital markets, contains recommendations to facilitate Equity Crowdfunding.

The proposed model includes the following requirements:

- Issuers must be private companies incorporated in Israel
- Issuers need to obtain an approval from the Office of the Chief Scientist (a governmental entity that oversees all government sponsored R&D)
- A "sophisticated investor" with expertise in early stage investment has to invest at least 10% of the amount raised from the public, on the same terms and valuation
- The proposed limit on the total amount raised by an issuer through Crowdfunding in 12 month is NIS 2 million (approximately US\$ 550,000) and each individual investor is limited to NIS 20,000 (around US\$ 5,500) of total Crowdfunding investments and NIS 10,000 (approximately US\$ 2,800) in a single investment in a 12 month period, with higher amounts for wealthy investors
- A "funding manager", regulated by the Israeli Securities Authority, has to supervise the funding process
- The Crowdfunding investors have to receive a tag along right to participate in any future sale of the founders or the sophisticated investor

After receiving comments from the public until July 31, 2013, the interim report was submitted to the Chairman of the Israeli Securities Authority.

2.9.2 Law Proposal: Securities Law (Social Funding for Businesses), 5772 – 2012.

This law proposal was prepared by Israel parliament member Avishay Braverman. The proposal is based on the US model of the JOBS Act. The proposal was never submitted for vote. Mr. Braverman may continue pursuing his proposal.



3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Israel

Israel is not an EU member state and therefore the European Alternative Investment Fund Managers Directive ("AIFMD") is not applicable.

4 Conclusion

Until further legislation changes, Equity Crowdfunding in Israel needs to be based on exemptions from the prospectus requirement of the Securities Law. Applicable exemptions include limited number of investors (35), certain types of sophisticated investors and "qualified clients", defined by their financial assets and investment expertise. It is evident that absent new legislation, Equity Crowdfunding in Israel is severely restricted. Other forms of Crowdfunding are not similarly restricted. Several Crowdfunding platforms already operate in Israel under the various models.

5 Contact details of the authors:

Dr. Ayal Shenhav, Adv.
Managing Partner
ayal@shenhavlaw.co.il



Shenhav & Co.
Advocates and Notary
4 Ha'nechoshet St.
Tel Aviv 69710
Israel

Tel: 972 3 6110760
www.shenhavlaw.co.il

SHENHAV & CO.
Advocates & Notary

Gal Hoffman, Adv.
Partner
gal@shenhavlaw.co.il



ITALY



1 Current Crowdfunding Models in Italy

In Italy, there are three types of Crowdfunding.

Lending Model and Donations or Rewards Model are not specifically regulated by provision of law, and impact of the existing legislation must be assessed case by case depending on the activity carried out by the relevant platform.

Equity Crowdfunding is regulated by Law n. 221 of 17 December 2012 (Law 221/2012) and by CONSOB Regulation of 26 June 2013 n. 18592 (CONSOB Regulation). Equity Crowdfunding is available only for innovative start-up which meet requisites set forth in Law 221/2012 and that are enrolled in a special section of the Companies Register. Innovative start-up may offer their capital to the public through on-line Crowdfunding platforms registered in a special register held by CONSOB (Register of Platforms), provided that the overall amount of shares or quotas offered does not exceed 5.000.000,00 euros. CONSOB Regulation is inspired by regulation applicable to investment companies, although the ordinary set of rules applicable to investment companies shall not apply to platforms which are not investment companies and/or banks (and that therefore cannot perform certain operations).

1.1 The Equity Model

According to this model, individuals make investments to subscribe share capital in the target company.

Currently⁴⁹ no platform has been registered yet in the Register of Platforms and therefore we cannot report any transaction actually concluded under the new Equity Crowdfunding legislative framework.

There are a few platforms offering a kind of Equity Model: they operate without any kind of licence and only engage in the business of investment broking and/or contract broking (*i.e.* no subscription of shares and quotas is concluded through the platform, which basically offers an online window to companies looking for investors). They ensure security offerings comply with exemptions from the requirement to produce a prospectus.

1.2 The Lending Model

According to this model individuals lend money to other individuals (against interest and repayment of the loan) through a platform which acts as point of contact between borrowers and lenders.

The two existing Italian platforms under this model operate under authorization by Bank of Italy (although they opted for different authorizations).

⁴⁹ As of September 6, 2013

1.3 The Donations or Rewards Model

Under the Donations Model, individuals provide money to a company or project pro bono, for charity or for other purposes but, in any case, without any monetary reward.

The Donations or Rewards Model is mainly used to finance social, charity or creative projects or companies and no financial investment or return is involved. Investors fund projects or companies and either get no return at all or only receive non-monetary rewards (e.g. tickets, CDs or rewards of a symbolic value).

2 Current Regulation of Crowdfunding platforms in Italy

2.1 Financial Service licence requirements

2.1.1 Equity Model

Pursuant to Italian Consolidated Financial Law and Italian Consolidated Banking Law, anyone intending to provide investment services in Italy commercially or on a scale which requires a commercially organised business undertaking requires a written licence from the competent authorities (CONSOB and/or Bank of Italy).

Investment services are, inter alia, the brokering of business involving the purchase and sale of financial instruments or their documentation (investment broking), the purchase and sale of financial instruments in the name of and for the account of others (contract broking) and the placement of financial instruments without commitment to take up those instruments (placement of financial instruments).

Financial products within the meaning of the Italian Consolidated Financial Act include securities and financial instruments.

Securities are, inter alia, (a) company shares and other shares equivalent to shares of companies, partnerships or other persons and share deposit certificates; (b) bonds and other debt securities, including certificates of deposit relating to such securities; (c) any other security normally negotiated which permits the purchase or sale of securities described in the preceding paragraphs d) any other security usually involving cash settlement determined with reference to securities described in the preceding paragraphs, to currency, interest rates, returns, commodities, indices or measures.

Financial instruments are, inter alia, securities, money market instruments, units in collective investment funds, options, futures, swaps, futures contracts on interest rates and other derivative contracts linked to securities, currency, interest rates or returns, or on commodities, derivatives for the transfer of credit risk, differential financial contracts.

Equity-based Crowdfunding has been identified as a model to raise financing and help a company to succeed in executing certain projects. Italy has regulated this matter pursuant to Law 221/2012 which permits the raising of money online to support the development of "innovative start-up

companies", being companies which meet requirements specified under the same Law 221/2012⁵⁰. According to the new legislation, only shares and quotas (of innovative start-up companies) may be offered for subscription through a Crowdfunding platform.

On June 26, 2013 CONSOB has issued regulation n. 18592 which sets forth rules on the register of Platforms, requisites for the registration in the Register of Platforms, rules of conduct of the platforms, rules on the offers through platform, obligations of communications to CONSOB, sanctions.

Law 221/2012 seems to restrict the possibility of raising money online only to the Italian entities falling within the definition of "innovative start-up". However, whilst this is clearly a significant restriction, it may be that categories of equity investee may be widened after an initial trial period.⁵¹

The management of a platform for the collection of capital for innovative start-up can be conducted only by (i) investment companies and banks, that are enrolled automatically in a special section of the Register of Platforms or (ii) companies specifically authorised by CONSOB to provide the relative service and that are enrolled in the ordinary section of the Register of Platforms, if they meet the relevant requirements. Such latter platforms are subject to a regulation which is lighter than that applicable to investment companies and banks. In turn, they are required to transmit the orders regarding the underwriting and trading of financial instruments representing capital exclusively to banks and investment companies (*i.e.*, they cannot process them) and have no right to collect money from investors.

2.1.2 Lending Model

The two existing Italian platforms under this model operate under authorization by Bank of Italy (although they opted for different authorizations).

Any platform operating lending Crowdfunding shall evaluate which kind of authorization must be required depending on the range of activities envisaged (*ie*, financing and/or payment service, etc).

2.1.3 Donations or Rewards Model

These kinds of contributions are structured so as not to constitute investment products and therefore the platform operating this model falls outside of the Italian financial services regulation.

2.2 Licence under the Payment Services regulation

Any transfer of funds through a Crowdfunding platform could constitute money remittance services and be subject to payment services regulation.

⁵⁰ Article 25, paragraph 2 of Law 221/2012.

⁵¹ A first revision already took place: Law Decree no. 76/2013, subsequently converted into Law 99/2013, has lightened some requisites or limits imposed to innovative start-up (such as requisites of man power, deletion of requirement of majority shareholding by natural persons, etc).

As already noted, the Crowdfunding Platform under the Equity Model cannot hold sums of money or financial instruments belonging to third parties, unless it is authorised as a bank or an investment company.

2.3 Prospectus requirements

The prospectus requirement does not apply to the offering of securities or investment products with a value of EUR 5,000,000 or less within a time period of 12 months.

Law 221/2012 has provided that same limit applies also to Equity Crowdfunding and this should not restrict the diffusion of Equity Crowdfunding since the amounts raised are generally smaller. Hence, Crowdfunding platforms operating the Equity Model will not be subject to prospectus requirement: however, they will be subject to a specific set of rules included in CONSOB Regulation as to information to be publicly available on the platforms itself, information on the offer of shares and quotas to be provided in compliance with a form published by CONSOB, etc.

No prospectus requirement is likely to apply in respect of the Lending Model or the Donations or Rewards Model.

2.4 Possible additional requirements

The operator of a Crowdfunding platform could be subject to further regulations, in particular:

- Italian Money Laundering law
- Italian Data Privacy law
- Consumer credit regulation
- Italian Law 231/2001

3 Possible regulation of Crowdfunding platforms under the AIFMD regime

3.1 Status of AIFMD implementation

All EU member states had to implement the European Alternative Investment Fund Managers Directive ("AIFMD") before 22 July 2013.

Implementation of the directive has not yet occurred in Italy. By delegation law no. 96/2013, the Parliament fixed the main principles of the provisions to be adopted and has delegated to the Government responsibility for preparing and enacting the relevant final implementation law. The delegation law has been published on the Italian Official Gazette on August 20, 2013.

Based on the prior draft delegation law, on July 3, 2013, the Treasury Department had submitted to the public a draft of provisions amending the Consolidated Financial Law. Several associations have sent observations and remarks, pointing out – inter alia – that the implementation will require a full review of the secondary legislation (such as Regulation by Bank of Italy on collective management of funds and Ministerial Decree n. 228/1999).

In addition, considering that some of the provisions of the Directive may be held self-executing and that EU Regulation 231/2013 is already in force since July 23, 2013, on July 26, 2013 Bank of Italy and CONSOB have published a joint communication with some clarifications on rules applicable until implementation law is enacted.

3.2 Crowdfunding Platform

As a general rule the manager of a Crowdfunding platform does not raise capital from investors itself. A Crowdfunding platform will not "manage" the underlying investment, since it merely arranges investment into it.

In conclusion, it seems that Crowdfunding platforms should not constitute an AIFM and innovative start-up should not constitute an AIF.

4 Conclusion

The Lending Model is not subject to a specific regulation (although operators must carefully review which authorisation must be sought pursuant to the Consolidated Banking Law or the Consolidated Financial Law).

The Equity Model is subject to its own regulatory regime, which is fully applicable and in force as of July 2013.

Law 221/2012 restricts the possibility of raising money online only to Italian entities falling under the definition of innovative start-up⁵². This provision could be seen as a contradiction to the clear intention of the European Commission to support the Crowdfunding raising on a wider basis.

In a country like Italy in which 1,000 new companies start every day, this law could materially limit the application of the investment model and prevent the "crowd" from deciding which company to back for success in the future.

Another provision which could limit the diffusion of Equity Crowdfunding is that an offer can be executed and processed only if at least 5% subscription of the share capital is made by a professional investor⁵³. The reason behind CONSOB decision is the need to have at least one investor to professionally evaluate the business and the investment, in order to protect the other shareholders' investment (i.e. those coming from the "crowd").

Again, this provision could materially limit the raising of money, without bringing any actual protection of the public investors. The efficacy of this method of investor protection is questionable, but the limitations it imposes on Crowdfunding do not appear consistent with the European Commission's view.

⁵² As of September 2, 2013, innovative start-up amount to 1.093.

⁵³ In the draft CONSOB Regulation this was a condition precedent to commence the online offer; probably due to the outcome of public consultation and to the negative reaction of the market to this limit, the condition has been modified into a condition subsequent to the accomplishment of the offer.



Although it is not clear whether AIFMD regime does apply to companies seeking funds through Crowdfunding platforms (which needs to be further assessed), if it were to apply, it would make any attractive cost-reward ratio impossible.

5 Contact details of the authors:

Umberto Piattelli
Partner
umberto.piattelli@osborneclarke.com



Osborne Clarke
Corso di Porta Vittoria 9
20122 Milan
Italy

+39 02 5413 1770
www.osborneclarke.com



Laura Quintavalla
Senior Associate
laura.quintavalla@osborneclarke.com





LATVIA



1 Current Market of Crowdfunding platforms in Latvia

There are no established Crowdfunding models (except the Donations or Rewards Model; but mainly this model is used for social projects but not for business projects). On the basis of current Latvian law theoretically all three Crowdfunding models (i.e., the Equity Model, the Lending Model and the Donations or Rewards Model) are possible.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

There are no operating Crowdfunding platforms based on Equity Model in Latvia.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There are no operating Crowdfunding platforms based on Lending Model in Latvia.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model is used predominantly to finance social projects. No financial investment or return is involved. Investors fund projects or companies and get no return at all or a non-monetary reward (e.g. posters, labels, tickets etc.). In many cases these rewards are of a symbolic value only.

2 Current Regulation of Crowdfunding platforms in Latvia

2.1 Licence under the Financial Instrument Market Law (in Latvian – *Finanšu instrumentu tirgus likums*)

2.1.1 Equity Model

Pursuant to the Financial Instrument Market Law ("FIML"), anyone intending to provide investment services in Latvia commercially or on a scale which requires a commercially organised business undertaking requires a licence from the Financial and Capital Market Commission ("FCMC"). Investment services are, inter alia, the brokering of business involving the purchase and sale of financial instruments or their documentation (investment brokerage), the purchase and sale of financial instruments in the name of and for the account of others (contract brokerage) and the placement of financial instruments without commitment to underwrite those instruments (placement of financial instruments).

Under the FIML "financial instruments" mean an agreement, which concurrently creates financial assets for one person, but financial liabilities or capital securities for another. Transferable securities (in Latvian – pārvedami vērtspapīri) are covered by this definition of the financial instruments.

Transferable securities are, inter alia, (a) shares in stock companies and other securities equivalent to shares in companies; (b) bonds or other forms of securitised debt; or (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

In summary, where an online Crowdfunding platform facilitates the offering of financial instruments, most likely, the operator of the platform will be deemed to provide investment services within the meaning of the FIML and therefore will require a licence by the FCMC.

2.1.2 Lending Model

Depending on the structure in detail loans are considered as "debt" (in contrast to equity) and would not qualify as investment services under the FIML.

Where the borrowers are the consumers then the licence for consumer crediting shall be obtained from the Consumer Rights Protection Centre.

2.1.3 Donations or Rewards Model

Depending on the structure in detail there are good reasons to state that these kinds of investments do not qualify as investment services. Therefore, it should fall outside the scope of Latvian investment services regulation.

2.2 Licence/notification under the Payment Services and E-Money Law (in Latvian - Maksājumu pakalpojumu un elektroniskās naudas likums)

In addition to the requirements set out above, any transfer of funds through the operator of a Crowdfunding platform will generally constitute money remittance services within the meaning of the Payment Services Law. Such transfer of funds could occur if the investors pay their investment amounts to the operator of the Crowdfunding platform who then passes the funds to the entrepreneur.

The platform operator might rely on the exemption for commercial agents under the Payment Services Law.

As an alternative - in order to avoid such licensing or notification, as a case may be, requirements - the operator of a Crowdfunding platform might use an external provider or partner for processing payments rather than acting as an intermediary himself.

We are not aware of any cases in Latvia where either of above exemptions have been applied to Crowdfunding platform. Thus, in each situation where any of these exemptions is considered we

strongly recommend that beforehand respective project the structure of each platform is coordinated with the FCMC and/or local counsel is involved.

Besides, most likely entity managing the platform which is not a credit institution cannot hold sums of money belonging to third parties because such sums might be qualified as deposits. Under the Credit Institutions Law (in Latvian – *Kredītiestāžu likums*) only credit institutions are permitted to advertise (in Latvian – *izsludināt*, which in English means to advertise, to announce, to proclaim) the receipt of deposits and other repayable funds, and to receive them.

2.3 Prospectus requirements

General rule

Where transferable securities are offered to public (i.e., offer is expressed to more than 150 individuals in each EU Member State) it might be subject to a prospectus requirement, namely a requirement to publish a prospectus approved by the FCMC under the FIML.

Depending on the structure, loans do not generally constitute as financial instruments under the FIML and therefore no prospectus is required. The same should apply to investments where individuals provide money to a company or project for benevolent reasons or for a non-monetary reward (Donations or Rewards Model).

Exceptions from prospectus requirement

The general prospectus requirement does not apply where (a) the offering of transferable securities does not exceed EUR 100,000 within a time period of 12 months, (b) solely qualified investors are addressed, (c) the offering is made in respect of transferable securities whose nominal value is at least EUR 100,000, or (d) in offering each investor must acquire transferable securities whose nominal value is at least EUR 100,000 and acquiring of one transferable security so that it belongs to several persons is prohibited.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Civil Law (in Latvian – *Civillikums*);
- Commercial Law (in Latvian – *Komerclikums*);
- Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing (in Latvian - *Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums*);
- Natural Persons' Data Protection Law (in Latvian – *Fizisko personu datu aizsardzības likums*);
- The Cabinet of Ministers regulations and/or FCMC regulations in relation to investment services and payment institutions (where applicable);
- Consumer Rights Protection Law (in Latvian – *Patērētāju tiesību aizsardzības likums*).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Latvia

3.1 Status of AIFMD implementation

All EU member states must implement the European Alternative Investment Fund Managers Directive ("AIFMD") before 22 July 2013.

Latvia has implemented AIFMD by adopting a new law "Law on Alternative Investment Funds and its' Managers" (in Latvian - *Alternatīvo ieguldījumu fondu un to pārvaldnieku likums*) ("AIFM Law") which entered into force on 7 August 2013.

3.2 Definition of an alternative investment fund ("AIF")

According to the AIFM Law the extensive AIFMD regulation of funds and fund managers applies when there is an alternative investment fund ("AIF") managed by an alternative investment fund manager ("AIFM").

Therefore, it is crucial to the impact of the national AIFMD regulations on Crowdfunding whether any of the participants qualifies as an AIF or an AIFM.

The AIFM Law provides that AIFs include a collective investment undertaking which:

- raises capital from a number of investors,
- with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- is not an operating company conducting business outside the financial sector; and
- does not require authorisation pursuant to Article 5 of Directive 2009/65/EC (UCITS).

AIF can be established as pool of assets (in Latvian - *lietu kopība*), joint stock company or as partnership.

With regard to the requirement that the investment undertaking is not an operating company, the European Securities and Markets Authority (ESMA) in its consultation paper on "Guidelines on key concepts of the AIFMD" published 19 December 2012 considers that "an ordinary company with general commercial purpose should not be considered a collective investment undertaking".

However, since we are not aware of any cases in Latvia in relation to Crowdfunding platform we strongly recommend that in each situation before respective project is started the structure of respective project is coordinated with the FCMC.

3.2.1 Operating company seeking funding ("Operating Company")

In this note the Operating Company means operating company outside the financial sector – e.g., the "typical" start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform.



As stated above, AIFM Law does not apply to operating companies outside the financial sector which do not invest in accordance with a defined investment policy. In general, these requirements are met in relation to the Operating Company. Such companies should therefore fall outside the scope of the Latvian AIFMD regulation.

3.2.2 Project Company seeking funding ("Project Company")

In this note the Project Company seeking funding means a company established to finance a single project such as for example a movie, a computer game, a wind farm or a solar park that does not operate the facility or production itself.

Equity Model

We are of the opinion that it cannot be excluded that this kind of the Project Company might constitute an AIF within the meaning of the Latvian AIFMD regulation if it seeks funding in return for a share in the profits or revenue generated by the project provided that the funding is envisaged for its own project and does not distribute the funding to other companies/ entities to finance their projects.

Lending Model

We are of the opinion that a loan should generally be capable of being structured as a non-AIF investment on the basis that the investor does not share liability for any losses and is entitled to repayment of the loan.

Donations or Rewards Model

Where the Project Company does not offer any kind of revenue but instead offers (often small) non-financial rewards (e.g. ticket or a copy of the movie or game in return) it might be argued that the funds are not invested *for the benefit of those investors* and the funding therefore contains no collective investment undertaking and no AIF.

3.2.3 Crowdfunding Platform

As a general rule the operator of a Crowdfunding platform does not raise capital from investors for its own business. Therefore, the operator of the Crowdfunding platform should not qualify as an AIFM.

There is a lack of practice on use of Crowdfunding platforms for fundraising in Latvia, hence there is also a lack of guidelines provided by the regulator on whether a Crowdfunding platform would qualify as an AIFM. The answer to this question will depend on the scope of services provided by the Crowdfunding platform in practice. There might be a room for an argument that the Crowdfunding platform qualifies as AIFM if the Crowdfunding platform performs investment management or other functions that under the law can be performed only by licenced or registered AIFMs. For instance, under AIFM Law one of ancillary services of AIFM is a distribution of units or shares of AIF. This could apply if the underlying investment (e.g. a Project Company) qualifies as an AIF and the relevant



Crowdfunding platform in fact distributes the shares of that AIF. Each situation should be evaluated separately to establish whether the Crowdfunding platform qualifies as AIFM. As it was noted previously the consultations with the FCMC and/or involvement of local counsel is strongly recommended for such evaluation.

4 Conclusion

Although Crowdfunding as such is not performed in Latvia, theoretically it would be possible to carry out such projects. However, several Latvian law provisions are unclear as to how they should be applied in relation to Crowdfunding. In any event, in each situation we strongly recommend coordinating the envisaged project with Latvian financial market supervisory authority – Financial and Capital Market Commission and/or involve local counsel before such project is started.

5 Contact details of the authors:

Ģirts Rūda
Partner
girts.ruda@sorainen.com



SORAINEN
Kr. Valdemāra iela 21
LV-1010 Rīga
Latvia

Tel +371 67 365 000
www.sorainen.com



ESTONIA LATVIA LITHUANIA BELARUS

Inese Heinacka
Associate
inese.heinacka@sorainen.com





LITHUANIA



1 Current Market of Crowdfunding platforms in Lithuania

There are no operating Crowdfunding platforms in Lithuania. Although it may be argued that there is one Crowdfunding platform in Lithuania, the purpose of the latter platform is to finance social projects only. Due to its limited purpose, the said Crowdfunding platform is excluded from the analysis. Lithuania generally does not have any experience in Crowdfunding, but three different models for Crowdfunding could be designed in the country (please see below).

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

There are no operating Crowdfunding platforms based on Equity Model in Lithuania.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

There are no operating Crowdfunding platforms based on Lending Model in Lithuania.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

As it was noted above the Donations or Rewards Model is used predominantly to finance social projects. No financial investment or return is involved.

2 Current Regulation of Crowdfunding platforms in Lithuania

2.1 Licence under the Laws of the Republic of Lithuania

2.1.1 Equity Model

In Lithuania, the Equity Model could be based on the acquisition of publicly offered equity securities (shares). Under the Law on Securities of the Republic of Lithuania (the Law on Securities, *Lith. Lietuvos Respublikos vertybinių popierių įstatymas*), public offering of securities means a communication to persons in any form and by any means offering securities and presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide to purchase or subscribe to these securities. Public offering of securities requires publishing a prospectus, with several exemptions (please see paragraph 2.3).



The designed Equity Model could be implemented with or without a Crowdfunding platform:

- Crowdfunding based on the Equity Model could be implemented by a company issuing and publicly offering its equity securities (shares). For the purpose of using this form of Crowdfunding, the following requirements should be met:
 - (a) Under the Law on Companies of the Republic of Lithuania (the Company Act, *Lith. Lietuvos Respublikos akcinių bendrovių įstatymas*), only shares of a public limited liability company could be offered publicly;
 - (b) A public limited liability company can make a public offering of its own shares only;
 - (c) The public offering of shares requires publishing a prospectus (with several exemptions);
 - (d) A public limited liability company is not required to have a license for the public offering of its shares.
- Crowdfunding based on the Equity Model could be implemented by the Crowdfunding platform. The Crowdfunding platform could be designed to offer shares of a public limited liability company and to acquire the shares offered. Such activities of the Crowdfunding platform would qualify as provision of investment services under the Law on Markets in Financial Instruments of the Republic of Lithuania (the Law on MFI, *Lith. Lietuvos Respublikos finansinių priemonių rinkų įstatymas*). Under the Law on MFI, investment services could be provided by investment firms and commercial banks. Operation of the Crowdfunding platform requires meeting the following requirements:
 - (a) Only investment firms and banks could operate the Crowdfunding platform;
 - (b) A special licence is required for the provision of investment services, please see paragraph 2.3;
 - (c) Only shares of public limited liability companies could be offered publicly;
 - (d) Shares could be publicly offered through the Crowdfunding platform only after publishing a prospectus, with several exemptions.

In summary, Crowdfunding using the Crowdfunding platform designed would qualify as provision of investment services, and such activities would require a licence for the provision of investment services.

Funding through a Crowdfunding platform requires a licence. As mentioned above, the operation of the Crowdfunding platform would qualify as the provision of investment services, and such activities would require a licence for the provision of investment services under the Law on MFI. However, banks do not need to obtain any additional licence for the provision of investment services if the right to provide such services is granted by the licence of the credit institution. The licence of the credit institution is provided under the Law on Banks of the Republic of Lithuania (*Lith. Lietuvos Respublikos bankų įstatymas*).

The licence (either the licence for the provision of investment services or the licence of the credit institution) is granted by the Bank of Lithuania.

Collective Investment Undertakings

Where the profit share being offered to investors is not channelled through a standard corporate issuer/shareholder relationship, the investment may be characterised as a unit in a collective investment undertaking.

Only collective investment undertakings established under the Law on Collective Investment Undertakings of the Republic of Lithuania (the Law on Undertakings, Lith. *Lietuvos Respublikos kolektyvinio investavimo subjektų įstatymas*) and collective investment undertakings for informed investors established under the Law on Collective Investment Undertakings for Informed Investors (the Law on Undertakings for Informed Investors, Lith. *Lietuvos Respublikos informuotiesiems investuotojams skirtų kolektyvinio investavimo subjektų įstatymas*) could be designed as a Crowdfunding platform. An investment management company or an investment company should be established for the purpose of implementation of the Collective Investment Undertakings Model. Such an investment management company or investment company should obtain a special licence for its activities. Moreover, if the Equity Model in the form of a collective investment undertaking is implemented through an investment management company, this company should establish an investment fund. According to the nature of this model, the investment management company sells investment units of investment funds or the investment company sells its securities (shares) and collects funds which can be invested in various financial instruments, including equity or non-equity securities of other companies.

If the collective investment undertaking is designed on the basis of the acquisition of securities of investment funds or investment companies without using the Crowdfunding platform, the requirements of the Law on Undertakings or the Law on Undertakings for Informed Investors will apply. If the collective investment undertaking is designed on the basis of the acquisition of securities of investment funds or investment companies using the Crowdfunding platform, this may additionally result in the application of the above requirements of the Law on MFI related to the provision of investment services.

The Equity Model in the form of a collective investment undertaking may require the following licences/authorisations:

- Investment management companies and investment companies have to obtain a licence in accordance with the Law on Undertakings;
- Investment management companies managing investment funds for informed investors and investment companies for informed investors have to obtain a special authorisation from the Bank of Lithuania in accordance with the Law on Undertakings for Informed Investors.

2.1.2 Lending Model

The Lending Model could be implemented through the acquisition of non-equity securities (bonds). If the Lending Model is designed on the basis of the acquisition of debt securities without using the Crowdfunding platform, the above requirements of the Law on Securities may apply (please see above). If the Lending Model is designed as an acquisition of debt securities using the Crowdfunding platform, this may additionally result in the application of the above requirements of the Law on MFI related to the provision of investment services (please also above).

The Lending Model could also be designed on the basis of loans to be granted under loan agreements with or without the use of the Crowdfunding platform. When structuring the Lending Model as loans granted under loan agreements, it should be noted that acceptance of repayable deposits or other repayable funds from non-professional market participants is allowed for credit institutions only and

is subject to the licensing requirements established by Lithuanian law. Therefore, the intended business model, which includes financing to be provided via loans to be granted by non-professional market participants, should be carefully assessed in each individual case, and advance consultations with the Bank of Lithuania may also be needed.

Meanwhile, financing through loans under loan agreements concluded with professional market participants does not fall within the scope of licensed financial services under the Law on Financial Institutions of the Republic of Lithuania (the Law on Financial Institutions, *Lith. Lietuvos Respublikos finansų įstaigų įstatymas*) or within the scope of investment services governed by the Law on MFI (please see Equity Model above).

If funds are to be transferred to the borrower through the Crowdfunding platform as an intermediary, this may constitute the provision of payment services under the Law on Payments of the Republic of Lithuania (the Law on Payments, *Lith. Lietuvos Respublikos mokėjimų įstatymas*), which are subject to the licensing requirements. Please see paragraph 2.2 for further details.

The Lending Model designed on the basis of the acquisition of non-equity securities (bonds) through a Crowdfunding platform requires a licence. For the licensing of a Crowdfunding platform, please refer to Equity Model above.

2.1.3 Donations or Rewards Model

The Donations or Rewards Model is not common in Lithuania but could be designed without difficulty. The Donations or Rewards Model does not involve any form of investment services. The Crowdfunding platform based on donations or rewards is governed by the Civil Code of the Republic of Lithuania (the Code, *Lith. Lietuvos Respublikos civilinis kodeksas*) and Law on Charity and Sponsorship (the LCS, *Lith. Lietuvos Respublikos paramos ir labdaros įstatymas*).

Under the Code, activities such as aid and charity do not require any kind of licence. Relationships between the parties where individuals provide money to a company or project for benevolent reasons can be qualified as a contract of gift and those provided for a non-monetary reward can be qualified as a sale and purchase agreement.

For the purpose of using the Donations Model of Crowdfunding, the following requirements of the LCS must be met:

- (a) recipients of sponsorship must be legal entities granted the status of a recipient of sponsorship by the Register of Legal Entities;
- (b) natural persons must not be providers of charity. Providers of sponsorship must be any natural persons of Lithuania or foreign countries. No licence is required.
- (c) charity and sponsorship must be provided: (1) by transferring monetary funds or any other assets and by rendering services free of charge; (2) by providing assets as a loan for use; (3) by bequeathing any assets by will; (4) in any other manner allowed by law.

In summary, a Crowdfunding platform could be designed in Lithuania. However, it must comply with national legislation.

2.2 Licence under the Law on Payments of the Republic of Lithuania (*Payment Services Directive*)

The transfer of funds through a Crowdfunding platform may be considered as a payment service under the Law on Payments.

The provision of payment services is subject to the licensing requirements in Lithuania. Since the establishment of a new payment service provider may take three to six months to complete and includes a significant amount of paperwork (operating programme, business plan, organisational structure, internal control procedures, etc), EU-licensed payment service providers may choose to provide payment services on a cross-border basis without establishing a branch, through a branch or an intermediary (which would generally require notification of the intention to provide payment services in Lithuania through its home Member State supervisory authority to the Lithuanian supervisory authority (the Bank of Lithuania)).

Following the pattern of the Payment Services Directive, the Lithuanian law provides for certain exemptions from the licensing and other regulatory requirements applicable to payment services. However, the possibility to apply such exemptions should be carefully assessed in each individual case; additional consultations with the Bank of Lithuania may also be needed.

2.3 Prospectus requirements

If securities (shares and/or bonds) are publicly offered to investors, the company issuing the securities has to publish a prospectus. The prospectus can be published only after the Bank of Lithuania approves it. Requirements for the preparation, submission and approval of the prospectus and exemptions from the requirement to publish the prospectus are established by the Law on Securities.

Where securities (shares and/or bonds) are publicly offered through a Crowdfunding platform, the operator of the platform is not responsible for publishing the prospectus. However, the operator of the Crowdfunding platform should ensure that the securities are publicly offered through the Crowdfunding platform only after the prospectus is published.

If the Collective Investment Undertakings Model is implemented for the purpose of Crowdfunding, two different types of prospectuses may be required:

- If an investment fund or an investment company is established under the Law on Undertakings, the prospectus should be prepared in accordance with this law.
- If an investment fund or an investment company is established under the Law on Undertakings for Informed Investors, the prospectus should be prepared and approved in accordance with the Law on Securities.

2.4 Possible additional regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:



- Law of the Republic of Lithuania on the Prevention of Money Laundering and Terrorist Financing (*Lith. Lietuvos Respublikos pinigų plovimo ir teroristų finansavimo prevencijos įstatymas*);
- Law of the Republic of Lithuania on Consumer Credit (*Lith. Lietuvos Respublikos vartojimo kredito įstatymas*).

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Lithuania

AIFMD has not been implemented in Lithuania yet. However, a draft law implementing AIFMD has been provided to the Parliament of the Republic of Lithuania. Due to the uncertainty of implementation of AIFMD in the national law of Lithuania and possible regulation of alternative investment funds, further analysis of the regulation of Crowdfunding platforms under the AIFMD regime in Lithuania is not provided.

4 Conclusion

There is no regime specifically tailored to Crowdfunding in Lithuania. Crowdfunding would be a new form of financing in Lithuania, and the legal environment should be developed accordingly.

Today, Crowdfunding platforms in Lithuania can be operated by supervised entities only. To sum up, Lithuanian legislation does not provide for any models of financing that facilitate Crowdfunding via the mass media channels.



EUROPEAN
CROWDFUNDING
NETWORK

5 Contact details of the authors:

Tomas Kontautas
Partner

tomas.kontautas@sorainen.com



Augustas Klezys
Senior Associate

augustas.klezys@sorainen.com



Tomas Talutis
Senior Associate

tomas.talutis@sorainen.com



SORAINEN
Jogailos 4
LT-01116 Vilnius
Lithuania

Tel +370 52 685 040
www.sorainen.com



ESTONIA LATVIA LITHUANIA BELARUS



LUXEMBOURG



1 Current Market of Crowdfunding platforms in Luxembourg

In Luxembourg, to our knowledge, only one Crowdfunding platform has been created so far and it was based on the Donations or Rewards Model but does not exist anymore.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

To date, Luxembourg does not yet have a Crowdfunding platform built after the Equity Model.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Again, no Crowdfunding platform under the Lending Model operates in Luxembourg.

Nonetheless, both forms of Crowdfunding should be possible under Luxembourg law; they have just not yet been put into place. In fact, when asked a parliamentary question on Crowdfunding activities in Luxembourg, the Luxembourg Minister of Finance pointed out in November 2012 that the evolution of Crowdfunding in Luxembourg seems to differ from what can be noted in other countries.

He explained that the Commission de Surveillance du Secteur Financier (the “CSSF”), the Luxembourg financial supervisory authority, has only on a few rare occasions been approached in the matter and that all projects were still at the development stage. He also confirmed that even though such Crowdfunding activities would fall under the supervision of the CSSF, the lack thereof explains the fact that the CSSF has yet to pronounce itself on the matter.

Hence all of the above stated developments remain purely theoretical.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The only form of Crowdfunding to have existed in Luxembourg was built after the Donations or Rewards Model. It was used to finance artistic projects and investors were given non-monetary rewards, for example in the form of special thanks on the album cover of a CD the production of which was financed via the platform.

2 Current Regulation of Crowdfunding platforms in Luxembourg

As of this moment Luxembourg does not have any regulations that are specifically targeted at Crowdfunding. Nonetheless, other laws and regulations may apply.

2.1 Licence under the law on the financial sector dated 5 April 1993, as amended

Equity Model and Lending Model

Depending on the services offered by the Crowdfunding platform, be it under the Equity or the Lending Model, it is possible that the law on the financial sector could be applicable, which would mean that the Crowdfunding platform could be required to obtain a specific licence in order to execute its activities. This would be the case if the Crowdfunding platform was to offer investment or banking services. In particular, the Crowdfunding platform could be considered a credit institution or possibly a professional carrying out lending activities if it was to grant loans under the Lending Model.

In that respect, investors, if they invest through a Crowdfunding platform operating under the Lending Model (depending on the manner they are financed), might also be considered to provide banking or lending services for which a licence could in theory be required.

Donations or Rewards Model

Most probably, Crowdfunding under the Donations or Rewards Model should not fall within the scope of the law on the financial sector. No licence would therefore be required.

2.2 Licence under the law on financial markets dated 13 July 2007, as amended

Equity Model and Lending Model

Depending on the services offered by the Crowdfunding platform, the platform might be considered to constitute a Multilateral Trading Facility and the law on financial markets would become applicable. The platform would have to obtain a licence from the minister, having in his competences the CSSF, before beginning its activities.

Donations or Rewards Model

A platform operating under the Donations and Reward Model should probably not fall within the scope of the law on financial markets and therefore no licence would be required.

2.3 Prospectus requirements

By offering to investors to subscribe to transferrable securities, the Crowdfunding platform (depending on its exact form) could be required to publish a prospectus, which would have to get approved by the CSSF.

2.4 Possible additional Regulations (depending on the use of proceeds)

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Amended law on undertakings for collective investment dated 17 December 2010;
- Amended law on specialised investments funds dated 13 February 2007;

- Amended law relating to the investment company in risk capital ("SICAR") dated 15 June 2004;
- Anti-money laundering law dated 12 November 2004, as amended;
- Law regulating the access to the occupations of craftsman, tradesman, industrialist and certain liberal professions dated 2 September 2011;
- Law of 10 November 2009 on payment services, on the activity of electronic money institution and settlement finality in payment and securities settlement systems (the "PSD").

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Luxembourg

3.1 Status of AIFMD implementation

It has been implemented on 12 July 2013 by the law on alternative investment fund managers.

3.2 Definition of an alternative investment fund ("AIF")

Article 1 paragraph 39 gives the following definition: "Alternative Investment Funds (AIFs)": collective investment undertakings, including investment compartments thereof, which:

- (a) raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and
- (b) do not require authorization pursuant to Article 5 of Directive 2009/65/EC.

Equity Model

Under the Equity Model it is possible that the Crowdfunding platform could be considered to fall within the definition of an alternative investment fund and, thus could fall within the scope of the law on alternative investments fund managers, whereby licence requirements could apply.

Lending Model

In accordance with the interpretation provided by ESMA, it is rather unlikely that a Crowdfunding platform operating under the Lending Model (and being financed through loans) would be considered an alternative investment fund.

Donations or Rewards Model

In our opinion a Crowdfunding platform operating under the Donations and Rewards Model would not be considered an alternative investment fund and should therefore not fall within the scope of the law on alternative investment fund managers.



4 Conclusion

Although welcome, Crowdfunding has yet to arrive in Luxembourg. Neither the legislator nor the financial authority have given any indications as to how Crowdfunding will be organised on the field or what laws and regulations will be applicable. It has to be noted that the CSSF ensures the respect of applicable laws which might potentially apply to the Crowdfunding platforms. Nevertheless, it has to be kept in mind that the CSSF, generally speaking, is very flexible and will probably deal in a pro-active way with prospective Crowdfunding platforms on a case-by-case basis.

It may also not be ruled out that, should Crowdfunding become a popular and wide-spread tool, the Luxembourg legislator would be keen to put in place an attractive legislation in this respect.

5 Contact details of the author:

Adrian Sedlo
Partner
sedlo@sjlc-legal.com



SJLC | Sedlo Jimenez Lunz Clément
45, allée Scheffer
L-2520 Luxembourg

Tel : +352 24618520
www.sjlc-legal.com

Nathalie Steffen
Associate
steffen@sjlc-legal.com



SEDLO JIMENEZ LUNZ CLEMENT
LAW FIRM LUXEMBOURG

THE NETHERLANDS



1 Current Market of Crowdfunding platforms in The Netherlands

In the Netherlands, there are various types of Crowdfunding which are recognised as such by the Dutch regulators, being the Dutch Central Bank (*De Nederlandse Bank N.V.*; “DNB”) and the Financial Markets Authority (*Stichting Autoriteit Financiële Markten*; “AFM”). Financial regulatory laws for the Netherlands are mostly dealt with in the Financial Supervision Act (*Wet op het financieel toezicht*; “FSA”).

The interest in Crowdfunding platforms and Crowdfunding initiatives is growing significantly in The Netherlands. Whereas in 2012 the total amount of monies sourced by way of Crowdfunding was approximately EUR 14 million, in the first half of 2013 such amount was almost matched with EUR 13 million.⁵⁴ This significant growth has also raised the interest of DNB and the AFM and they have jointly issued statements with respect to their views on Crowdfunding.⁵⁵ The AFM and DNB have identified, from the perspective of the lender, four models; investments (Equity Model or Debt Model), lending (Lending Model), donations and sponsoring (the latter two jointly the Donation or Rewards Model). From the perspective of the Crowdfunding platform no specific legislation has been drawn up in The Netherlands. However, it is clear to the AFM that the activities of the Crowdfunding platform in their nature have a strong alignment with intermediary type of activities. Depending on the Crowdfunding model of choice, such intermediary activities could in themselves be regulated as well.

1.1 The Equity or Debt Model (individuals make investments in return for (i) a share in the profits or revenue generated by the company/project or (i) a debt obligation type of instrument)

In this model the person gives money in return for shares or other financial instruments bearing equity like characteristics.

A person could also give money in return for debt obligations rather than shares and as such one could speak of an Equity/Debt Crowdfunding Model.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

In this model, a person gives money as a loan to a project, and their reward is to recover the economic value. Apart from recovering the money that has been lent, this type of Crowdfunding can also include an element of receiving interest. As such the person investing in the Crowdfunding entity at times can get back more than it had borrowed to the Crowdfunding entity. It also includes paying

⁵⁴ Source: www.douwenkoren.nl

⁵⁵ Translated: “DNB and AFM are orientating themselves on “Crowdfunding”” and “DNB and AFM give interpretations on Crowdfunding”.

money to a Crowdfunding entity that is yet to produce its product and which, as a result does not yet yield any returns, the so-called pre-sale modelling.

1.3 **The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)**

The Donation or Rewards model does not involve any form of financial investment or return. Crowdfunding originated from Donations or Rewards-based platforms relates to situations where the interest of the participant is solely to help a worthy or interesting cause for the sake of being associated with it, rather than making any financial profit of it. If indeed there is no financial rewards for the Donation or Reward this type of Crowdfunding Model falls outside of the scope of the FSA.

2 **Current Regulation of Crowdfunding platforms in The Netherlands**

As a general note and as explained above, the Crowdfunding platform in its nature is likely to be regarded by the AFM as an intermediary type of platform. Hence rules on intermediation are more likely to apply to Crowdfunding platforms rather than rules on offerings of securities / shares / debt / etc. Such rules are more likely to apply to parties which are seeking funding through the use of the Crowdfunding platform (the Crowdfunding entity).

2.1 **Licence under the Dutch Financial Supervision Act**

2.1.1 Equity (and Debt) Model

Shares and bonds are regarded as financial instruments. In such case the Crowdfunding platform is likely to be regarded as an investment firm within the meaning of the Markets in Financial Instruments Directive (Directive 2004/39/EC). As a result the Crowdfunding platform requires a license as an investment firm with respect to the acceptance and transmission of orders of lenders with respect to financial instruments (order remitter).

Since a debt instrument will normally have a repayment term, the issue of debt instruments also qualifies as the attracting of repayable funds. Repayable funds is to be explained under the FSA as funds which are to be repaid at some point of time. The taking up of repayable funds (*opvorderbare gelden*) is to be taken into account as this activity is also regulated under the FSA when such repayable funds are received from non-professional market parties. The intermediation in respect of the attracting of repayable funds from non-professional market parties is also a regulated activity. Normally speaking the Crowdfunding platform would require either a license or a dispensation from the AFM in order to allow it to operate as intermediary with respect to the attracting of repayable funds.

As for the issuer of the debt instruments, the Exemption Regulation to the FSA provides for an exemption on this prohibition if the debt instruments are issued in accordance with Part V of the FSA. This in effect is a reference to the Prospectus Directive. In practice this means that an issuer that offers debt instruments in accordance with the Prospectus Directive (or an exemption thereunder) is not subject to the FSA prohibition on the attracting of repayable funds. When making use of aforesaid exemptions one should be careful as most of the exemptions are subject to strict



conditions, relating to selling restriction requirements and visual tags relating to the offering (*vrijstellingsvermelding*). If such requirements are not properly executed, the exemption is not available.

2.1.2 Lending Model

The making of non-consumer loans is not treated as a regulated activity under the FSA. However, the AFM and DNB suggest that borrowers that use Crowdfunding as an alternative to normal bank loans, could very well qualify as consumers. As such the Crowdfunding platform may require a license as a financial services provider (*financieeldienstverlener*) due to the fact that it intermediates in relation to consumer credit.

As explained the taking up of repayable funds (*opvorderbare gelden*) is also to be taken into account since this activity is also regulated under the FSA when such repayable funds are received from non-professional market parties. As an example, should the funds taken from (non-professional) investors be held in escrow by the Crowdfunding platform, or an entity specifically designated for the escrow or even the designated Crowdfunding entity itself, until closing of the transaction, the escrow activity may be taken as an activity which qualifies as 'attracting of repayable funds' under the FSA. Unless a banking license or exemption is available, the attracting of repayable funds from non-professional market parties is prohibited under the FSA.

Additionally and as explained under the Equity / Debt model, the intermediation in respect of the attracting of repayable funds from non-professional market parties is also a regulated activity. Should the Crowdfunding platform be engaged in such intermediary activities it would require either a license or a dispensation from the AFM.

2.1.3 Donations or Rewards Model

As explained, if indeed there is no financial reward for the Donation or Reward this type Crowdfunding Model falls outside of the scope of the FSA.

2.2 Licence under the Payment Services Directive (2007/64/EC)

The transfer of funds through the operator of a Crowdfunding platform could constitute money remittance services and be subject to payment services regulation.

Where external regulated financial institutions are used for processing payments the Crowdfunding platform could avoid being regulated as a payment services provider.

Note that only banks or investment firms can hold sums of money or financial instruments belonging to third parties. Similar to what is reflected in paragraph 2.1, it should be noted that it is prohibited to attract repayable funds (i.e. funds that are to be repaid) from parties other than professional market parties (within the meaning of the FSA).

2.3 Prospectus requirements

The prospectus requirement does not apply to the offering of securities or investment products with a value of EUR 2,5 million or less within a time period of 12 months. Until now no Crowdfunding initiatives in The Netherlands have resulted in offerings of equity or debt anywhere near such amount. As a result, a Crowdfunding platform operating the Equity Model or Debt Model is unlikely to be subjected to prospectus requirements. However, as explained above, the use of exemptions is subject to strict formal requirements. If such requirements are not properly met, the exemption is not available in the first place.

No prospectus requirement is likely to apply in respect of the Lending Model or the Donations or Rewards Model.

Under the Act of Unfair Trade Practices (*Wet oneerlijke handelspraktijken*) the platform itself or the entity / person that provides (investment) information in relation to a Crowdfunding transaction can be held liable if it conducts an unfair trade practice towards a consumer. This could be the case if the information that is presented to investors (consumers) is misleading or incorrect. Misleading is also to be understood as leaving out information that is deemed important to a consumer in its investment decision (a so-called misleading omission)

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include, but is not limited to:

- Anti money laundering regulations
- Act on protection of personal data (*Wet bescherming persoonsgegevens*);
- Act on unfair trade practices (*Wet oneerlijke handelspraktijken*, as implemented in several Dutch acts, including the Dutch Civil Code);
- Act on the consumer credit (*Wet op het consumentenkrediet*).
- Dutch civil code (not only in relation to corporate / contract law, but also implementing provisions on consumer credit and unfair trade practices)

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in The Netherlands

The Alternative Investment Fund Management Directive (“AIFMD”) which has taken effect as of 22 July 2013, indeed has been implemented into the FSA and lower legislation promulgated thereto.

It is to be noted that the AIFMD (or fund structures in general) has not been mentioned in the context of Crowdfunding in the Netherlands. A Crowdfunding structure could constitute an AIF under the FSA. Regulators however have not yet made any comments on this issue to date. The AIFMD allows for a more lenient regime if the assets under management do not exceed a certain threshold. The exact rules are too detailed for the purposes of this briefing. The lowest thresholds amount is a EUR 100 million. Notwithstanding the aforesaid threshold, an AIF that does not exceed the threshold but which offers participations to retail investors in principle is caught by the AIFMD regime in full.



An additional disclosure regime applies to retail offerings of AIFs. The disclosure rules must ensure transparency and should allow retail investors to receive proper information on their potential participation/investment.

The recognised Crowdfunding platforms seem to take form mostly in the form of the Equity (/Debt) Model. This could explain the absence of discussions of the AIFMD in the context of Crowdfunding in the Netherlands. It is understood however, that some jurisdictions indeed have found certain Crowdfunding platforms were operating within the scope of the AIFMD.

4 Conclusion

Currently the Netherlands has no regulatory regime that is specifically adapted to Crowdfunding. The AFM and the DNB have recognised that parties are in doubt as to whether certain Crowdfunding initiatives trigger the application of the FSA and consumer credit rules in general. To this end the AFM and the DNB have issued guidance papers.

The activities of Crowdfunding platforms have a strong alignment with intermediary (or advisory) type of activities. Depending on the Crowdfunding model of choice, such intermediary and advisory activities could be regulated under the FSA. The Crowdfunding entity itself can also be regulated under the FSA, most likely as an issuer of equity or debt, participations or as a party taking up repayable funds from non-professional market parties. Consumer credit issues are to be taken into account as well.

5 Contact details of the authors:

Ella van Kranenburg
Lawyer
ellavankranenburg@kvdv.eu



Keijser Van der Velden N.V.
Groesbeekseweg 96
6524DJ
Nijmegen
The Netherlands

Tel: +31 629397407
www.kvdv.eu

KEIJSER VAN DER VELDEN
advocaten

PORTUGAL



1 Current Market of Crowdfunding platforms in Portugal

There are three broad types of Crowdfunding. In Portugal, the two main types of Crowdfunding platforms operate under the Lending Model and the Rewards Model:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The Equity Model usually implies, in exchange for a contribution or investment, the assignment of shares or warrants to buy shares of the company or the granting of a percentage share or fixed return from any revenues (or profits) generated by the company in the future.

This Model is still difficult to implement in Portugal due to the lack of specific legislation on this subject, once, according to the current Portuguese legislation, the offering of shares or any kind of equity interest in share companies would probably imply the compliance with the requirements of the Portuguese Securities Exchange Commission ("CMVM") including the registry of the platform as a financial intermediary at the CMVM and (eventually) the approval of a prospectus (according to the requirements established in the Portuguese Securities Code).

1.2 The Lending Model (more specifically, the pre-sale lending sub-model)

Traditionally, the Lending Model involves a loan to fund the project, with an expectation of monetary reimbursement in the form of interest. However, this model may be difficult to be implemented in Portugal, once it is qualified as a credit or financial transaction, which may only be carried out in Portugal by duly authorised credit or financial institutions.

Probably due to this, most of the Crowdfunding platforms in Portugal are based in a so called Pre-sale Lending Sub-model, where the finished product or service is promised in return for and according to the contributor's loan (usually through an assessment of the fair market value of the product/service). Pre-sales are also often combined with a Rewards Model.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

In the Donations or Rewards Model, individuals make a financial contribution to a project without any expectation of a financial return on that contribution.

The most common model in Portugal is probably the Rewards Model, where the individuals that fund the project are often recognized for their support with rewards that can increase according to the amount of money provided by each individual.

2 Current Regulation of Crowdfunding platforms in Portugal

2.1 General regulation

2.1.1 Equity Model

With the current legislation it is difficult to implement this model in Portugal, due to the fact that the public offering of shares or any kind of interest in a limited liability company by shares (*"sociedade anónima"*) to unqualified investors is deemed by the Portuguese Securities Code as an activity of financial intermediation which can only be carried out by duly authorised Financial Intermediaries (that comply with all the requirements established by CMVM and *"Banco de Portugal"*).

This qualification will involve the registry at CMVM as a Financial Intermediary and the compliance with all the requirements of supervision of CMVM that also includes the approval and issuance of prospectus regarding each offer and several requirements to guarantee the quality of the information made available to public investors, to prevent conflict of interests, etc.

The only exemptions we may appoint as applicable, is the offering of the shares just to qualified investors to the potential investors of an interest (*"quotas"*) in a limited liability company by quotas (*"Sociedade por quotas"*), once this kind of interest does not qualifies as a security, according to the Portuguese Securities Code. However, this type of legal structure is not suitable for Crowdfunding financing method, once this kind of company is not advisable for projects involving a high number of investors.

We only found one platform in Portugal offering the Equity Model, although, to our knowledge, not registered as a Financial Intermediary at CMVM.

We have no public pronouncements on this matter by the Portuguese Regulatory Authorities. A new legal regime to govern Crowdfunding is being discussed.

2.1.2 Lending Model

A traditional Lending Model that involves the lending of money through the Crowdfunding platform with the expectation of reimbursement in the form of interest probably could only be carried out in Portugal by a credit or financial institution, duly authorised by the Bank of Portugal (*"Banco de Portugal"*). Therefore, the Crowdfunding platforms would have to be authorised by the Bank of Portugal and would be under the supervision of this entity.

However, the Pre-sale Lending Sub-model (where the finished product or service is promised in return for and according to the contributor's loan) does not fall under the financial services legal regime and, therefore, under the authorisation and supervision of CMVM.

2.1.3 Donations or Rewards Model

The most common model in Portugal is the Rewards Model, were the individuals are recognized for their support with rewards that can increase according to the contribution of each individual, thus this model also do not require any licence/authorisation nor fall under the supervision of CMVM or

Bank of Portugal. Sometimes we may find this model also combined with the Pre-sale Lending Sub-model, where besides the finished product/services, individuals are also recognized for their support with a specific reward (for example, public recognition).

2.2 License under the *CMVM* and *Banco de Portugal*

As already stressed above, Portuguese Crowdfunding platforms that adopt an Equity Model or a Lending Model (where the reimbursement is made in the form of interest) may be qualified as financial intermediary (in the first case) or as a credit or financial institution (in the second case).

According to the Portuguese Securities Code ("CVM") the services and activities of investment in financial instruments (as, for example, receive and order the transmission of shares on behalf of investors and the offer shares to the public), like other financial activities, may only be carried out by Financial Intermediaries, duly registered at CMVM.

This registry may depend on an authorisation to be issued by *Banco de Portugal* (depending on the specific activity to be carried out), the submission of identification information concerning the Financial Intermediary and the evidence that the company has the necessary means (human, material and technical) to carry out the intended activity.

Besides the mandatory registry, the Securities Code also establishes several periodic information requirements to be met by Financial Intermediaries (with a supervision purpose), to check if the means comply with the provisions of internal organization and compliance requirements foreseen in Securities Code.

In what concerns the financial or credit institutions, it is mandatory the registry at *Banco de Portugal*, before starting the activity, which is made through the submission of identification information concerning the company to the Bank of Portugal. Also in this case periodic information must be disclosed to *Banco de Portugal* for supervision purposes.

As for the eventual application of the Payment Services Directive to Crowdfunding platforms, we understand that transfer of funds through operator may constitute a money remittance service, and therefore an authorisation from Bank of Portugal would be required. However, an exemption established for authorised commercial agents may be applicable to Crowdfunding platforms.

2.3 Prospectus requirements

According to Portuguese Securities Code, all public offers of shares must be preceded by the issuance of a Prospectus which must be previously approved by CMVM. However most Crowdfunding platforms will fall in the exemption established for offers with a total value under EUR 5 million, calculated during a period of 12 months.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform could be subject to include:

- Decree-Law nr. 375/2007, dated November 8th, that establishes the legal regime of Venture Capital;
- Law nr. 25/2008, dated June 5th, concerning the prevention of money laundering;
- It is currently in discussion a specific legal regime for Crowdfunding platforms. According to the draft made public, besides the authorisation and supervision of CMVM for the Lending and Equity Models, Donations and Rewards Models will be required to communicate its activity to the “Direcção Geral do Consumidor” (an authority that acts on consumer’s protection) just for information purposes. This new regime also includes several information requirements (including transparency obligations for the beneficiaries of Crowdfunding), limits to the investment and prevention of conflicts of interest.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Portugal

3.1 Status of AIFMD implementation

The implementation of the Alternative Investment Fund Managers Directive (AIFMD) has not been executed in Portugal, although all EU member states should implement this Directive until July 22, 2013.

According to the text of AIFMD Directive, Crowdfunding platforms may be deemed as offers of AIF’s, however we will have to wait for the implementation to take a position on this matter.

4 Conclusion

Crowdfunding has not been specifically regulated in Portugal, therefore only the Donations or Rewards Model and the Pre-sales Model have seen development among Portuguese Crowdfunding platforms.

According to Portuguese Banking Law and Securities Code, platforms that adopt the traditional Lending Model and the Equity Model may fall under the legal regime of financial institutions or financial intermediaries, although the supervision authorities have not made public statements on this matter.

This regulatory framework is expected to have great developments in the following years due to the importance of access to capital of small and medium sized companies in Portugal.



5 Contact details of the authors:

Manuel Ferreira da Costa
Partner
mfc@smfcnet.com



Sousa Machado, Ferreira da Costa &
Associados
Rua Castilho, 5 – 4º
1250-066 Lisboa
Portugal

Tel +351 21 092 48 00
www.smfcnet.com



SOUSA MACHADO, FERREIRA DA COSTA
& associados

SOCIEDADE DE ADVOGADOS, RL



ROMANIA



1 Current Market of Crowdfunding platforms in Romania

Crowdfunding in Romania is in an early stage, although probably the earliest project of this kind was the financing through public subscription over 125 years ago to finance the construction of the Romanian architectural and cultural symbol, the Romanian Athenaeum, in Bucharest, which opened in February 1888. The financing campaign was promoted through the slogan “Pay a leu⁵⁶ for the Athenaeum!”.

Amongst the first interchanges in recent years among business angels and Crowdfunding was the television show “Lions’ Arena” broadcast nationally in January 2007, which used crowd-source techniques via television.

Following the development of the internet and social networks, Crowdfunding platforms appeared in Romania starting from 2011, when VentureConnect platform was launched.

In Romania, there are three types of Crowdfunding:

- a) Capital Projects – initiated by companies against issuance of shares/bonds;
- b) Creative Projects – launched by companies or , requesting donations, usually in exchange of non-financial rewards;
- c) Charity Projects – usually initiated by aid organisations or non-working foundations, requesting donations.

Romanian platforms are organized based on the models of equity or debt investments and donations.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Few Romanian platforms offer the possibility to individuals to make investments in return for a share in the profit generated by the project or the company:

- i) Multifinantare platform supports only Romanian joint-stock companies which intend to obtain capital by issuing new stocks or bonds, as well as Romanian municipalities planning to issue municipal bonds. The stocks and/or bonds will be registered with an independent shareholders’ register (Registrul Miorita SA) and with the Trade Register. In case of capital increase, the company may issue shares representing 35% at most of its share capital, while

⁵⁶ Romanian currency.



the amount of the issued bonds will not exceed 25% of the company's assets⁵⁷. The platform does not have a maximum limit on capital to be raised; however, it should be somewhere around EUR 100,000⁵⁸.

- ii) TechAngels supports projects seeking to raise between EUR 10,000 and EUR 200,000, but financed up to EUR 1,000,000, in tech projects, focusing especially on web, mobile, embedded software, hardware and meditech⁵⁹.
- iii) AngelConect (a platform of VentureConect)⁶⁰ is dedicated to business angels active in Romania and Eastern-Europe. VentureConect organises pitching sessions as an opportunity for start-ups to quickly present their business to a panel of VCs in order to receive feedback, guidance and a possible investment, usually of up to EUR 50,000. Since its launch, VentureConect has financed two projects (out of which one of EUR 500,000).

Considering that the investments currently target small companies which do not offer securities to the public, prospectus requirements (i.e. of EUR 1,000,000 for shares and 200,000 for bonds) do not apply.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

No Romanian platform is currently providing financing based on the Lending Model.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Most of the Romanian Crowdfunding platforms promote donations, usually with certain non-monetary rewards:

- i) Multifinantare Platform supports financing of "creative" projects and charity projects from a broad range of activities (such as agriculture, culture, social etc.), against rewards (for example, a project for development of an apiary offers rewards consisting in naming a beehive and collecting the bee honey and wax from the same).
- ii) Crestem Idei⁶¹ promotes projects for the development of the community, design/graphic, film, photography, sport, writing and publishing. Since its set-up, it has helped financing 6 projects and has collected more than EUR 11,000.
- iii) We are Here is dedicated to cultural, creative, instructive and technological projects in order

⁵⁷ <http://multifinantare.ro>

⁵⁸ According to Mirel Borodi, the creator of Multifinantare.ro

⁵⁹ <http://www.techangels.ro>

⁶⁰ <http://www.angelconnect.ro>

⁶¹ <http://crestemidei.ro>

to promote and finance their launching⁶².

- iv) Pot si Eu is another newly launched platform supporting artistic projects (theatre, creation etc.)⁶³.
- v) Mindfruit⁶⁴ supports all kind of projects (technological, publishing etc.), that recently adapted its financing policy from “all or nothing” to “flexible financing”, pursuant to which the initiator keeps all amounts collected, provided that the amounts raised are used for the project and the donee receives the promised reward.

2 Current Regulation of Crowdfunding platforms in Romania

2.1 Licence under the Capital Market Law

Capital markets activity is subject to the provisions of Law no. 297/2004 on capital markets (“Capital Markets Law”), Law no. 31/1990 regarding companies (the “Companies Law”), Law no. 31/2006 regarding securitisation of receivables (the “Securitisation Law”), Law no. 32/2006 regarding mortgage bonds (the “Mortgage Bonds Law”) and secondary legislation issued by the Financial Supervisory Authority (“ASF”).

Investment services in Romania may be provided by brokers registered with ASF, as follows: (i) financial investment services companies (“SSIF”); (ii) credit institutions authorized by the National Bank of Romania (“NBR”) and (iii) investment firms and credit institutions authorized to provide financial investment services by the competent authorities from the EU Member States.

SSIFs are Romanian legal entities, established as joint-stock companies and operating upon based on an authorization issued by the Financial Supervision Authority (“ASF”), providing investment services and activities on professional basis⁶⁵. An SSIF must have a minimum share capital of EUR 50,000 if it does not handle funds and/or financial instruments belonging to investors, does not trade financial instruments on its own account and does not subscribe to the issuance of securities on a firm commitment basis; EUR 125,000 if it does not trade financial instruments on its own account and does not subscribe to the issuance of securities on a firm commitment basis; or EUR 730,000, if it is authorized to carry all the investment services provided by the law.

While not providing investment services, investment consultants provide in a professional manner investment consulting services regarding financial instruments. Investment consultants are individuals or legal entities registered with the ASF Register⁶⁶.

Considering the fact that the Crowdfunding activities in Romania are in an incipient stage and generally do not engage the activities mentioned above (target companies are not publicly listed), pursuant to our research, it appears that none of the Crowdfunding organizations is registered with

⁶² <http://www.we-are-here.ro>

⁶³ <http://potsieu.ro/>

⁶⁴ <http://www.mindfruit.ro>

⁶⁵ Pursuant to article 6 of the Capital Markets Law.

⁶⁶ Pursuant to article 35 of Capital Markets Law.

ASF as an SSIF or an investment consultant. However, should any activity fall under the relevant legislation, the respective Crowdfunding organization should be registered with ASF prior to carrying out any of these activities.

2.2 Licence under the Payment Services Regulation

Payment services are mainly regulated by the Romanian Government Emergency Ordinance no. 113/2009 regarding payment services ("Payment Services Law"), which transposed the Payment Services Directive 2007/64/EC, as well as by the provisions of NBR Regulation no. 21/2009 regarding payment institutions.

Payment services may be provided by payment services providers, including credit institutions, entities issuing electronic money and payment institutions, which shall be authorized by the NBR. However, the authorization to provide payment services is not applicable to entities licensed as deposit-taking banks, as e-money issuers or as non-banking financial institutions ("IFN").

A payment institution authorized in another EEA member state can use the EEA passport system under the payment Services Directive 2007/64/EC by sending a notice in its member state in accordance with the procedures of that member state.

Pursuant to the information available to us, Crowdfunding organizations in Romania do not provide payment services; therefore, they are not required to obtain an authorisation from NBR as payment services providers.

2.3 Prospectus requirements

Carrying out certain activities in relation to financial instruments may trigger various licensing requirements (e.g., as a general rule, public offering of securities is subject to the approval of a prospectus by ASF; admission to trading on a regulated market of a company's shares is subject to the approval of a prospectus by ASF).

The Romanian rules on public offerings on the capital markets apply to offers of securities in Romania regardless of where the issuer is located. The main conditions for a company to be listed on the capital markets are: to be organized as a joint-stock company and to be a public company (i.e. a percentage of its shares is owned by the public).

Preparation and publication of a prospectus is not required (i) for the offer of securities targeting solely qualified investors and/or targeting fewer than 150 natural or legal persons other than qualified investors for each Member State and/or for other offers specified by ASF regulations under the law; and (ii) for the securities offered, allotted or to be allotted in connection with a merger or division, provided that a document is available, document containing information considered by ASF equivalent to those which shall include prospectus, taking into account the European legislation; (iii) for dividends paid in the form of shares to existing shareholders in the same class as those which give

right to such dividends; and (iv) in other cases specified by regulations issued by ASF, under the law⁶⁷.

Pursuant to the Romanian law, securities means shares in companies and other equivalent securities, traded on the stock market, bonds and other debt securities, including government securities with maturity less than 12 months, negotiable on the capital market, as well as any other securities normally dealt with, giving the right to acquire any such transferable securities by subscription or exchange, giving rise to a cash settlement, excluding payment instruments. Therefore, a donation, even with financial return, will not be considered to be subject to the public-offering rules.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

2.4.1 Regulation of lending activity

The lending activity is mainly subject to the provisions of Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy as further amended (the “Banking Law”), as well as by a series of laws issued by the Parliament, and ordinances and decisions issued by the Romanian Government, as well as by the special regulations issued by NBR. Also, the operation of IFN acting in the field of granting loans (such as leasing companies and non-banking credit institutions) is subject to provisions of Law no. 93/2009 regarding non-banking financial institutions (“IFN Law”).

NBR exerts a supervisory activity with respect to financial institutions, as well as IFN (legal form, scope of business, share capital requirements etc.).

Pursuant to the Romanian law, any entity providing loans (including leasing companies and non-banking credit institutions) must be licensed or, as the case may be, registered with NBR. Therefore, in order for the Crowdfunding organizations to grant loans to initiators of the projects (either as individuals or registered as companies), the respective organisation should comply with the requirements of the Banking Law or, as the case may be, the IFN Law.

Although, at this moment, in Romania, no Crowdfunding platform is providing financing pursuant to the Lending Model, in principle, any financial institution which finances its customers for development of an activity/business by public issuance of stocks/bonds is subject to the provisions of the Banking Law or of the IFN Law.

Furthermore, in case the financed initiator is an individual, certain requests must be observed in the lending agreements.

In order to avoid breaching the requirements on the lending activity, some Crowdfunding organisations act as brokers between the initiator of the project and the banks and/or IFN.

⁶⁷ Pursuant to article 183 of the Capital Markets Law

2.4.2 AML requirements

Financial institutions (such as banks, institutions issuing consumer or commercial credit, mortgage/real estate lenders, leasing companies); financial investment service providers, as well as individuals or corporate traders of goods and/or services with EUR 15,000 minimum cash turnover⁶⁸ must observe the AML requirements, including identifying the customer, identifying, where applicable, the beneficial owner and taking risk-based and adequate measures to verify his identity, obtaining information about the purpose and intended nature of the business relationship, as well as conducting ongoing monitoring of the business relationship. Any transaction suspected of involving money laundering or terrorist financing must be reported to the NOPCML at once⁶⁹.

Therefore, Crowdfunding organizations subject to the provisions of Law no. 656/2002 must comply with AML rules and perform anti money laundering or terrorist financing checking.

2.4.3 Regulation of marketing and distance selling

The right to correctly inform customers is regulated under Ordinance no. 21/1992 regarding consumer protection ("Consumer Protection Law"). Furthermore, marketing and distance-selling (including through telephone, fax, e-mail) are subject to the provisions of Ordinance no. 130/2000 on consumer protection in conclusion and execution of distance contracts, Ordinance no. 85/2004 on consumer protection in distance contracts conclusion and performance of financial services (in case of distance contracts for financial services) and the Law no. 296/2004 on Consumer Code.

As in the Directive 97/7/EC on distance selling, Romanian regulations are expressly limited within the scope of distance selling and only apply to natural persons.

To avoid sanctions imposed by the National Authority for Consumer Protection ("NACP"), Crowdfunding platforms in Romania shall comply with the restrictions set by the marketing and distance-selling regulations.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Romania

3.1 Status of AIFMD implementation

Romania, in its capacity of EU member state, was to transpose Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers („AIFMD“) by July 22, 2013. Specifically, the AIFM Directive requires Member States to enact rules to ensure that every "alternative investment fund" ("AIF") has a manager (an "AIFM") responsible for ensuring compliance with rules set out in the directive. AIFs are defined in article 4(1)(a) as collective investment undertakings, other than UCITs, which "raise capital from a number of investors, with a view of investing it in accordance with a defined investment policy for the benefit of those

⁶⁸ Pursuant to article 10 of Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures for preventing and fighting against financing the acts of terrorism („Law no. 656/2002“).

⁶⁹ Article 3 paragraph (6) of Law no. 656/2002

investors". Under the guidelines published by ESMA, the features of such collective investment undertakings are as follows: they (a) do not have a general commercial or industrial purpose; (b) pool capital raised from its investors for the purpose of investment with a view to generating a pooled return for those investors; and (c) allow unit-holders or shareholders of the undertaking no day-to-day discretion or control.

However, at the date hereof, AIFMD has not been transposed into Romanian legislation, even though a draft proposal of the law on Alternative Investment Fund Managers (the "Proposal") was published on the ASF website⁷⁰.

3.2 Definition of an alternative investment fund ("AIF")

Pursuant to the Proposal, Romanian AIF means a collective investment undertaking other than undertakings for collective investment in transferable securities ("UCITS") established in Romania, irrespective of its legal form and structure formation and/or administration, including investment compartments thereof, which raise capital from at least two investors for placement in accordance with a defined investment policy for the benefit of those investors.

3.3 Application of AIFMD regime on Crowdfunding

If passed in the form of the Proposal, the law would generally apply to the Crowdfunding platforms organized as AIF, if the funding is granted as equity or loans, provided that the funding from participants is collected through the platform and disbursed by it (by its decision) to the initiators of the projects, with the Crowdfunding participants not having direct participations in the financed company or project.

From the information available to us, none of the Crowdfunding platforms in Romania seem to meet the criteria; thus, it is unlikely that the Proposal would impact them.

4 Conclusion

Romania seems to be a beginner in Crowdfunding activities, although several business angels have a constant presence on the Romanian market.

However, it appears that the interest in Crowdfunding has increased in the last few years and new Crowdfunding platforms have been set up in order to provide new financing solutions for the launching of successful businesses and to support their development by consultancy, transfer of know-how and best practice from business angels to the entrepreneurs.

⁷⁰ <http://www.cnvmr.ro/pdf/alteacte/Proiect-act-normativ-privind-administratorii-de-fonduri-2013.pdf>



5 Contact details of the authors:

Roxana Musoi
Partner

roxana.musoi@vilaumitel.ro



Carmen Banateanu
Senior Associate

carmen.banateanu@vilaumitel.ro



Adrian Vladu
Associate

adrian.vladu@vilaumitel.ro



Vilau & Mitel
143 Calea Grivitei
1st District
010741 Bucharest
Romania

Tel: +40 21 314 31 55/57

www.vilaumitel.ro

Vilau & Mitel

ATTORNEYS AT LAW

SLOVAK REPUBLIC



1 Current Market of Crowdfunding platforms in the Slovak Republic

Despite the fast developments in Crowdfunding globally, it is still rather new in the Slovak Republic. There are currently no identified Crowdfunding platforms established or functioning to date. As such, any specific legal framework is not in place and there is little to none practice as to the legal aspects of functioning Crowdfunding platforms. 3 models are in theory possible. The Equity Model, in which the individuals profit from the revenue the project generates, the Lending Model in which the individuals lend money and expect return with interest and the Donations / Rewards Model, under which the individuals make donation with a possible non-monetary reward. As noted above, there are currently no functioning Crowdfunding platforms in Slovakia, therefore the models described below under the applicable legal frameworks are rather theoretical and untested.

2 Current Regulation of Crowdfunding platforms in the Slovak Republic

2.1 General regulation of Crowdfunding platforms

2.1.1 Equity Model

The Equity Model entails individuals making an investment into an operating or project company, while their shares would bear the right to participate on revenues generated by it.

Offering of securities by the company would constitute a public offer of securities, as defined by Section 120(2) of the Act no. 566/2001 on Securities and Investment Services (the "Securities and Investment Services Act"). A public offer of securities is usually subject to the obligation to publish a prospectus. The issuer may be exempt from such obligation, if the total value of shares issued within the EU would be less than EUR 100,000 calculated over the period of 12 months (some other standard exemptions exist, but these are unlikely to apply in this case).

If the Crowdfunding platform facilitates the offering of securities, this activity constitutes an investment service. Subject to Section 54 of Securities and Investment Services Act, the Crowdfunding platform would have to obtain a license to provide such investment services from the National Bank of Slovakia (the "NBS"). There are no specific exemptions from this obligation available to Crowdfunding platforms.

2.1.2 Lending Model

In the Lending Model a person lends certain amount of money and expects to receive the principal with interest. 2 legal frameworks are in theory applicable, depending on the nature of lenders.

Lending is in general a regulated business, that may not be performed without a license under the Slovak Banking Act. It is however possible to be engaged in lending services based on a simple 'trade license', if performed in a non-banking manner – i.e. using personal funds of the lender. If the

respective loan agreement is concluded by entrepreneurs who are acting within their regular business, upon the entrepreneurs' own responsibility, independently with the intention to make profit, the loan would be governed by the Commercial Code. Interest is a mandatory element of such relationship, which may or may not be mentioned expressly, but will nonetheless accrue.

By contrast, if the loan is provided as a one-off investment by a private person, i.e. is not provided systematically as a business of the lender, the relationship will be governed by the Civil Code. Interest may or may not be agreed under such relationship and its regulation under the Civil Code is rather liberal.

Depending on the manner in which the Crowdfunding platform would function, it may be classified as an agent, assisting in the conclusion of the loan agreement between the parties. A simple trade licence for such activities would be required.

2.1.3 Donations or Rewards Model

A Crowdfunding platform which would organise collection of funds under Donations or Rewards Model would have to obtain a simple trade licence.

The requirements of a rather obsolete Act No. 63/1973 on Public Collections and Lotteries (the "APC") may apply to the Donations Model. The APC applies to any activity by which voluntary donations are being collected from further unspecified members of the public (the "Public Collection") and imposes several restrictions. In particular, Public Collections may only be held for publicly beneficial purposes, such as humanitarian purposes, charity, education, sport, protection of cultural items, cultural heritage or the environment. Any Public Collection must be approved to the relevant Regional Authority (in Slovak: "*obvodný úrad*") or the Slovak Ministry of Finance. Records of the contributions must be kept and must be submitted to the Regional Authority or the Ministry of Finance after the Public Collection has finished.

Due to the aforementioned administrative requirements and the fact that Crowdfunding of certain types of projects (e.g. business start-ups) would rarely satisfy the conditions of public benefit, Crowdfunding platforms would likely have to refrain from the use of the Donations model. Instead, the Rewards model should be used where each project typically defines rewards for contributors (goods or services being results of the supported activity) and the contribution is structured as a sale of such reward, thus falling out of the scope of the APC.

2.2 License under the Payment Services Act.

In case the relevant Crowdfunding platform would intend to provide payment services in Slovakia, such platform would have to be properly licensed under the Act no. 492/2009 on payment services and on the amendment of certain laws, as amended (the "Payment Services Act"). The Crowdfunding platforms may instead of license only opt to notify the relevant prudential authority in case they would become limited providers under the Payment Services Act.

Crowdfunding platforms could possibly avoid licensing or notification requirements if the platforms structure their activities so as to rely on exemptions under the Payment Services Act. Alternatively,

Crowdfunding platforms can outsource payment services by using an external payment services institutions.

2.3 Prospectus requirements

A public offer of securities is exempted from prospectus requirement provided that the total value of shares issued within the EU would be less than EUR 100,000 (in words: one hundred thousand euros) calculated over the period of 12 months. In addition, certain other standard exemptions from mandatory publication of prospectus exist, but these are unlikely to apply in connection with Crowdfunding.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Act No. 40/1964 the Civil Code
- Act No. 513/1991 the Commercial Code
- Act No. 455/1991 the Trade Licence Act
- Act No. 203/2011 on Collective Investment
- Act No. 250/2007 on Consumer Protection

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in the Slovak Republic

3.1 Status of AIFMD implementation

The AIFMD has been implemented in the Slovak Republic by way of amendment to the Act No. 203/2011 (the "Collective Investment Act"), effective on 22 July 2013. There is no practical experience with the newly implemented legislation and the experience in Slovakia shows it may take some time and several further amendments to the Collective Investment Act until the aim of the AIFMD is achieved. The overview below should therefore be read as a theoretical application of the AIFMD with no available precedents and no guidelines of the relevant regulatory authorities. It can also be noted that Slovak regulatory authorities will, in performing their supervisory function and interpreting the legislation, likely follow interpretations and recommendations of relevant European bodies such as ESMA, or practices of other member states' regulators.

3.2 Definition of an alternative investment fund ("AIF")

Pursuant to Section 4(12) of the Collective Investment Act, an AIF is either:

- a. special fund, i.e. a fund (without legal personality) that is not a standard fund and does not fulfil the requirements stipulated by the EU law (UCITS) and thus is not registered in the relevant registers of funds kept by the NBS,



- b. a collective investment undertaking, i.e. legal entity (limited partnership, limited liability company, joint stock company, Societas Europea or cooperative) with its registered office in Slovakia that is entitled to collect funds or assets that can be valued in money from several investors and perform collective investment of such funds or assets on the basis of a given investment strategy for the benefit of such investors.

3.2.1 Operating company seeking funding

Assuming that an “operating company” means a start-up or developing company seeking funding for its general commercial business by means of a Crowdfunding platform, the operating company will likely not be regulated under the Collective Investment Act. Collecting funds or assets, main purpose of which is the financing of activities that relate to the production or sale of goods, research or the provision of services (other than financial services) and further management of such funds or assets does not constitute collective investment. An operating company should therefore not be considered as AIF. The operating company would have to obtain a relevant trade license in order to be able to conduct its business.

3.2.2 Project Company seeking funding

Equity Model

A project company established to develop a specific project such as e.g. a movie, a computer game, a wind farm or a solar park and does not operate the facility or production itself might qualify as AIF (has a specific investment strategy for the benefit of its investors) and will therefore be subject to the regulation by the Collective Investment Act.

Lending Model

Under Slovak law, the lending of (own) money by individuals to a company / project in return for the repayment of the loan plus interest is a non-regulated activity. A project company seeking funding through loans should not be considered a regulated AIF. However, a detailed analysis for each specific case should be made and the guidance of the NBS may also be required in this respect.

Despite the fact that the lending of money would occur through a Crowdfunding platform, there are no regulatory requirements under the Banking Act or the Collective Investment Act. However, general civil and commercial rules regarding lending have to be observed (see also above).



Donations or Rewards Model

The provision of money by individuals to a company/project for charitable reasons or for small non-monetary reward constitutes an exemption under the Collective Investment Act; therefore, a project company that follows the Donations or Rewards Model should not be considered as AIF.

3.2.3 Crowdfunding Platform

A Crowdfunding platform organising funding for project companies under the Equity Model should not constitute an AIF. However, as noted above, the Crowdfunding platform will likely be viewed as providing investment services under the Securities and Investment Services Act when organising funding for project companies. Therefore, it would have to apply for the licence under the Securities and Investment Services Act.

No regulation should apply to a Crowdfunding platform that organises funding under the Lending Model or the Donations or Rewards Model.

4 Conclusion

There are currently no identified functional Crowdfunding platforms in the Slovak Republic. There is also no legal framework that would expressly regulate apply to Crowdfunding platforms. The above three models may function on the market under the existing legal framework, but there is no tested practice as yet. The lending and donations model are more practical due to limited regulation. The equity model would be subject to complex regulation under the Collective Investment Act and the Securities and Investment Services Act.

5 Contact details of the author:

Adam Hodoň
Partner
adam.hodon@kinstellar.com



Kinstellar
Hviezdoslavovo námestie 13
81102 Bratislava
Slovakia

+421259291111
www.kinstellar.com

KINSTELLAR



SLOVENIA



1 Current Market of Crowdfunding platforms in Slovenia

Crowdfunding is still a relatively new concept in Slovenia and currently several public initiatives are working on developing an operational and legal framework for this new type of financing. To date there are no Crowdfunding platforms operating in Slovenia and it has become common practice to use foreign platforms, mostly over the Internet, for funding projects. Social projects with charitable and humanitarian purposes are commonplace and raise funds under the Humanitarian Agencies Act (*Zakon o humanitarnih organizacijah*) through media campaigns and non-profit associations. There is yet no Crowdfunding specific legal framework in place, however under applicable law the equity, lending as well as donations or rewards based models are possible.

2 Current Regulation of Crowdfunding platforms in Slovenia

2.1 Licence under the Financial Instruments Market Act

Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Under the Financial Instruments Market Act (*Zakon o trgu finančnih instrumentov*), only banks, broker-dealers and investment enterprises that hold a licence issued by the Securities Market Agency may perform financial services and transactions. Financial services and transactions among others include brokerage and agency services involving financial instruments, operation of a multilateral trading facilities, investment consulting and trading of financial instruments on primary and secondary markets. Financial instruments include transferable securities, namely shares in joint-stock companies, *Societas Europaea* and limited partnerships with share capital, bonds, other debt securities and derivative financial instruments. However, membership units in limited liability companies and rights in limited and general partnerships formed under the Companies Act (*Zakon o gospodarskih družbah*) are not transferable securities and therefore do not fall under the regulation of the Financial Instruments Market Act. It must be noted that under the Companies Act a limited liability company may not have more than 50 members without a special approval of the Ministry of Economic Development and Technology.

Therefore, where a Crowdfunding platform enables the financial services and transactions with transferable securities a licence by the Securities Market Agency is required.

Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Trade and services related to offering of bonds and other debt securities qualify as provision of financial services and transactions under the Financial Instruments Market Act, which triggers the requirement for a licence by the Securities Market Agency.



Taking in of money from unsophisticated persons in the form of deposits or otherwise pursuant to a deposit or other agreement whereby the depositor has the right to request repayment in certain time periods is considered provision of banking services under the Banking Act (*Zakon o bančništvu*). Additionally, granting of credits and loans as a business activity is also provision of banking services under the Banking Act. Only banks holding a licence from the Bank of Slovenia are permitted to preform banking services.

Otherwise, private and personal lending of money in return for the repayment with interest is a non-regulated activity in Slovenia even if the lending occurs through online Crowdfunding platform. Therefore, the creditors would not require a licence, but the general civil and commercial rules regarding lending would still apply.

However, the performance of intermediary and agency services with respect to consumer credit and other loan agreements are considered supplementary financial services under the Banking Act and require a licence by the Bank of Slovenia or the Securities Market Agency.

Depending on the lending model of the Crowdfunding platform licences by the Securities Market Agency and/or the Bank of Slovenia may be required.

Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Games of chance under the Gaming Act (*Zakon o igrah na srečo*) are games in which participants share the same likelihood of winning a price or reward and where the outcome of the game depends exclusively or predominantly on chance or on another uncertain event. For performance of games of chance a licence or concession granted by the Government of the Republic of Slovenia and of the Ministry of Finance is required.

To qualify as recipient of donations that may be paid under direction of a donor out of the donor's personal income tax (up to 0.5% of personal income tax in a year) under the Personal Income Tax Act (*Zakon o dohodnini*) the recipient must each year apply and qualify as a recipient before the Ministry competent for his business area. Further requirements for recipients are set forth under the Personal Income Tax Act and the Decree of the appropriation of the personal income tax for donations (*Uredba o namenitvi dela dohodnine za donacije*). Other tax implications may apply to donations received through Crowdfunding.

Depending on how a Donations or Rewards model of the Crowdfunding platform is structured, it might trigger licensing requirement for games of chance and/or the Personal Income Tax Act. Otherwise, Donations and Rewards models are not subject to financial services regulation or licence requirements.

2.2 Licence under the Payment services and systems Act

In addition to any requirements set forth above, a transfer of funds through the Crowdfunding platform will most likely constitute a payment service under the Payment services and systems Act (*Zakon o plačilnih storitvah in sistemih*). Such transfer of funds would occur if the investor, creditor or donor paid and transferred the funds through the Crowdfunding platform to the entrepreneur



whereby the Crowdfunding platform performed any of these activities: deposit or withdrawal of cash, payment services for debit or credit of a bank account, issuance or acquisition of payment instruments, remittance of cash payments or transfer of funds by an intermediary between a costumer and a provider of goods and services. In Slovenia only banks, licenced electronic money institutions, payment institutions and cash remittance institutions may perform payment services if they were granted a payment services licence by the Bank of Slovenia.

A Crowdfunding platform might however be able to rely on the exemption for “technical service providers” under the Payment services and systems Act, if it outsourced the payment transactions so that it performed only technical services with respect to these payment transactions. Such technical services may include processing and storage of data, data safety and person identification services, IT and communication services, maintenance of payment services equipment and other similar technical services, as long as the provider of such technical services at any time does not have the power to freely dispose with the moneys that are being transferred.

2.3 Prospectus requirements

General rule

As a general rule nobody may offer securities in the Republic of Slovenia without publishing a prospectus that has been approved by the Securities Market Agency under the Financial Instruments Market Act. By offering of securities of third persons the Crowdfunding platform would likely fall under this requirement as the general rule applies to the same extent to any securities intermediaries. Same prospectus requirements would apply if bonds or other debt financial instruments would be used in a Crowdfunding financing model structure.

Exceptions

The prospectus requirement does not apply to the following offering of securities, in the relevant part: (i) hedge funds units, (ii) securities with the guarantee of the state or local government, (iii) offering of securities to sophisticated investors only, (iv) offering of securities to up to 150 natural or legal persons, who are not sophisticated investors, (v) offering of securities with the purchase price above EUR 100.000 for each individual offer of securities in such offering, (vi) offering of securities with nominal value of at least EUR 100.000 for each offered security, or (vii) offering of securities where the aggregate purchase price in the European Union within 12 months does not exceed EUR 100.000. Each subsequent offer of securities purchased under an exception to the prospectus requirement is subject to the general rule under the Financial Instruments Market Act defined above. In other words, each subsequent offer of securities purchased under an exception must rely on an exception or satisfy the prospectus requirement. Prior to any trade of securities on a stock exchange a prospectus must be approved by the Securities Market Agency and published in accordance with the Financial Instruments Market Act.

A limited prospectus requirement applies where the offering price of securities does not exceed EUR 5.000.000 in the European Union within 12 months. In such case, the issuer may replace the prospectus with a simplified prospectus under the Financial Instruments Market Act.

2.4 Possible additional Regulations

Other common regulations to which the operator of a Crowdfunding platform may be subject include:

- Consumer Protection Act (*Zakon o varstvu potrošnikov*)
- Consumer Protection against Unfair Commercial Practices Act (*Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami*)
- Consumer Credit Act (*Zakon o potrošniških kreditih*);
- Prevention of Money Laundering and Terrorist Financing Act (*Zakon o preprečevanju pranja denarja in financiranja terorizma*)
- Book Entry Securities Act (*Zakon o nematerializiranih vrednostnih papirjih*)
- Personal Data Protection Act (*Zakon o varstvu osebnih podatkov*)
- Investment Trusts and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*)
- Venture Capital Companies Act (*Zakon o družbah tveganega kapitala*)
- Supportive Environment for Entrepreneurship Act (*Zakon o podpornem okolju za podjetništvo*)
- Humanitarian Agencies Act (*Zakon o humanitarnih organizacijah*)
- Code of Obligations (*Obligacijski Zakonik*)

3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Slovenia

3.1 Status of AIFMD implementation

The AIFMD has not yet been implemented into the Slovenian law even though the implementation deadline of 22 July 2013 has past. The Securities Market Agency together with the Ministry of Finance are currently drafting the amendments to the Investment Trusts and Management Companies Act (*Zakon o investicijskih skladih in družbah za upravljanje*) as well the Act on alternative investment fund managers (*Zakon o upraviteljih alternativnih investicijskih skladov*), a new piece of legislation implementing the AIFMD in Slovenia. It is expected that the AIFMD will be implemented by the end of 2013.

3.2 Definition of an alternative investment fund ("AIF")

Entities within the meaning of a collective investment undertaking, which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors, are currently regulated only by the Investment Trusts and Management Companies Act implementing the UCITS Directive 2009/65/EC. Such entities are investment funds, namely mutual and umbrella funds, defined as funds whose sole purpose is investment in transferable securities and other liquid financial assets on the principle of risk spreading, within the meaning of Article 1 of the USTIC, and investment companies within the meaning of Chapter V of the USTIC. The Non-USTIC open ended investment funds under the Investment Trusts and Management Companies Act are the so called "alternative funds", defined as

funds that do not qualify as hedge or umbrella funds, which underlay more relaxed set of rules for permitted investments (for example precious metal or units of other funds), but require a minimal first investment into the fund in the amount of EUR 100.000. Only investment funds management companies holding a licence by the Securities Market Agency may operate investment funds in Slovenia.

Under the Venture Capital Companies Act (*Zakon o družbah tveganega kapitala*), a venture capital fund may be registered in the form of a joint-stock company, limited liability company, dual company, limited partnership or limited partnerships with share capital, which are all legal entity forms under the Companies Act. A venture capital fund is managed and legally represented by another legal entity and must among other invest at least 50% of the fund's assets in small and medium sized enterprises. The minimal amount of capital investment in the venture capital fund is EUR 50.000. The status of a venture capital fund may only be granted by the Ministry of Economic Development and Technology after the requirements of the Venture Capital Companies Act have been met.

The European Securities and Market Authority (ESMA) in its Guidelines on key concepts of the AIFMD of 13 August 2013 explained that an ordinary company with a general commercial or industrial purpose (i.e. one that pursues a business strategy, which includes running predominantly a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services, or an industrial activity, involving the production of goods or construction of properties, or a combination thereof), would generally not qualify as an alternative investment fund under AIFMD. It is expected that the Securities Market Agency and the Slovenian Legislator will follow the ESMA Guidelines in implementation of the AIFMD.

3.2.1 Operating company seeking funding

An operating company seeking funding would likely not qualify as neither a USTIC or Non-USTIC investment fund nor as a venture capital fund under Slovenian law, if it did not issue fund units for money received or operate an investment fund.

Under consideration of the above-mentioned ESMA Guidelines it is also expected that under the regulation implementing AIFMD in Slovenia the common start-ups or emerging companies with a general commercial or industrial purpose seeking funding through a Crowdfunding platform would not qualify as AIFs within the meaning of AIFMD.

3.2.2 Project Company seeking funding

Equity Model

Depending on the equity financing structure of a company established to finance a single project such as for example a movie, a computer game, a wind farm or a solar park (project company), it cannot be excluded that such project company might constitute an AIF under the Investment Trusts and Management Companies Act or the regulation that will be adopted for the implementation of the AIFMD or an AIF with the meaning of a venture capital fund under the Venture Capital Companies Act.

Lending Model

Depending on the debt financing structure of the project company it cannot be excluded that it might constitute an AIF under regulation that will be adopted for the implementation of the AIFMD. As noted above, performance of intermediary and agency services with respect to consumer credit and other loan agreements are considered supplementary financial services under the Banking Act and require a licence by the Bank of Slovenia or the Securities Market Agency.

Donations or Rewards Model

As noted above, in general donations or rewards based financing structures do not trigger licence requirements or other significant regulatory issues and would likely not constitute an AIF under the current law. However, tax, consumer protection and payment services laws may principally apply.

3.2.3 Crowdfunding Platform

If the Crowdfunding platform through its operations did not seek or raise funds from investors on its own behalf or operate an investment fund it will likely not fall under the regulation implementing the AIFMD in Slovenia. Provision of intermediary and agency services with respect to consumer credit and other loan agreements by a Crowdfunding platform would require a licence by the Bank of Slovenia or the Securities Market Agency.

4 Conclusion

Crowdfunding is not per se a heavily regulated business in Slovenia, but various regulatory and compliance issues might arise based on existing regulation of the financial instruments and markets, banking and payment services industries. In addition, the operation and investment through a Crowdfunding platform may have tax, consumer protection, game of chance and other legal implications that require attention.

Crowdfunding platforms, investors and companies seeking investment should also pay attention to the coming implementation of the AIFMD in Slovenia, which is likely to bring a new set of applicable regulation to the area of business financing as soon as by the end of 2013.

5 Contact details of the author:

Andraž Jadek
Senior Associate
andraz.jadek@jadek-pensa.si



Jadek&Pensa
Tavčarjeva ulica 6
1000 Ljubljana
Slovenia

Tel +38612342520
www.jadek-pensa.si

JADEK & PENSA



SPAIN



1 Current Market of Crowdfunding platforms in Spain

In Spain, there are three types of Crowdfunding.

1.1 The Lending Model

In this model, a person gives money as a loan to a project and their reward is to recover the economic value. Apart from recovering the money that has been lent, this type of Crowdfunding sometimes include interest, so that the "crowdworker" gets something more than what was paid. Also included in this type of Crowdfunding is the payment of an amount of money to buy a product that has not yet started to yield return. This is known as pre-sale lending model.

1.2 The Equity Model

The Equity Model is not viable in Spain without major adaptation. In Spain this model is based on Joint Accounts which implies a form of cooperation between individuals and companies, through which an account-participant contributes an amount of money to carry out an activity, foreign trade or business by receiving the participation-manager in property and its exclusive direction of the operation or activity, becoming participants in both prosperous and adverse outcomes in the proportion agreed upon.

1.3 The Donations or Rewards Model

Under the Rewards Model, individuals provide money to a project and the project offers "rewards". The rewards can be of any type: merchandising of a film, the use of a particular service, publically acknowledgement of their participation etc. The Rewards Model is the most common Crowdfunding model in Spain.

The Donations Model is run by platforms that are based in purely donations without rewards or money return. No financial investment or return is involved.

2 Current Regulation of Crowdfunding platforms in Spain

2.1 Lending Model

This model is based on loans between individuals. The platform is not formally a Crowdfunding platform, but it is considered as a financial intermediary. These platforms are governed by the Act 2/2009 regulating consumer contracting loans or mortgage and brokerage services for the conclusion

of contracts of loan or credit. Prior to commencing business, companies must register in the local regional registry.

The platforms that use this model are not required to have a financial entity licence or any other kind of licence. They act as corporations but their activity is regulated by the Act 2/2009, and the Corporations Act.

2.2 The Equity Model

This model is not viable in Spain in the same form as in other countries. The formation of a Sociedad Anonima ("S.A.") as the investment vehicle would entail compliance with the requirements of the Companies Act and the Securities Exchange Commission ("CNMV"). The lack of speed and efficiency associated with this process appears to be incompatible with the aims of Crowdfunding. Similar procedural issues attach to the constitution of a Limited Liability Company or S.L.

Instead, the Equity Model used in Spain operates by means of "Joint Accounts". The joint accounts are regulated by the Spanish Commerce Code, articles 239 to 243. This provides a simple mechanism for establishing a collective funding vehicle. It can be formalised online, does not require publicly or formality and allows freedom of agreements.

There is an alternative to the Joint Accounts Model. Platforms that act as a financial intermediary between the investor and the project can use financial instruments to provide a return on investment. Such platforms would generally fall under the scope of the Markets in Financial Instruments Directive 2004/39/EC ("MIFID").

Alternatively, the platform may fall within the scope of Royal Decree 217/2008, of 15 February, on the legal regime for investment services entities and other entities that provide investment services and partially amending the Regulations to Act 35/2003, of 4 November, on Collective Investment Schemes, approved by Royal Decree 1309/2005, of 4th of November.

As a matter of practice, Spanish Crowdfunding platforms operate outside the scope of supervision by the CNMV or the Bank of Spain.

Neither regulator has made public pronouncements on this matter and Crowdfunding platforms are currently not considered to be financial entities in practice, even though there is a case for treating them as such as a matter of law.

2.3 Donations or Rewards Model

The Donations and Rewards Models are not subject to financial services regulation.

2.4 Possible additional requirements

The operator of a Crowdfunding platform could be subject to further regulations, in particular:

- Draft bill XX/2013, de XX, regulating the private equity and other investment companies and their management companies. AIFMD integration.
- Draft bill that supports Entrepreneurs.

3 Possible regulation of Crowdfunding platforms under the AIFMD regime

3.1 Status of AIFMD implementation

All EU member states must implement the European Alternative Investment Fund Managers Directive ("AIFMD") before 22 July 2013.

Currently the Spanish authorities have published in draft the XX/2013 Bill of XX, which regulates private equity and other investment companies and their management companies. This bill has been approved by the Spanish State but further supplementary provisions need to be approved in order to implement the Directive.

Any platforms following the Equity Model could fall within the scope XX/2013 bill of XX, because it regulates the marketing of venture capital or OSI managed by managers authorised under the AIFMD. In both cases such marketing shall be subject to the authorisation of the CNMV and the product in question subject to registration with the regulator.

We expect Parliament to approve the draft bill in the course of this year.

4 Conclusion

There is currently no regulatory regime that is specifically adapted to Crowdfunding in Spain. However, operating the Equity Model is subject to regulation designed for other activities, such as the Royal Decree 217/2008, of 15 February, on the legal regime for investment services firms and other entities that provide investment services and partially amending the Regulations to Law 35/2003, of 4 November, on Collective Investment Schemes, approved by Royal Decree 1309/2005, of November 4.

As a matter of practice, Equity Model platforms are structured so as not to be regulated by the CNMV or the Bank of Spain. However, as a matter of law, it appears that many such platforms could nonetheless be conducting activities that fall within the scope of the Markets in Financial Instruments Directive or, when implemented, the Alternative Investment Fund Managers Directive.

Platforms using the Lending Model generally fall within the scope of the Act 2/2009.



5 Contact details of the authors:

Angel Garcia
Partner
angel.garcia@osborneclarke.com



Javier Beltran
Lawyer
javier.beltran@osborneclarke.com



Osborne Clarke
P.º Castellana, 52, planta 6
28046 Madrid
Spain

+34 91 576 44 76
www.osborneclarke.com





SWEDEN



1 Current Market of Crowdfunding platforms in Sweden

Crowdfunding is still a limited phenomenon in Sweden, this despite that Swedes consider themselves to be progressive and fast-adopters of new technology and trends. A number of attempts have been made to start successful platforms, but to date only four domestic platforms are operational. There is however no lack of interest (at least in the media), the usage of the term “Crowdfunding” in media outlets has seen a significant increase the last two years and Crowdfunding as an entrepreneurial tool has also raised considerable interest from the Swedish government.

The platforms currently operating in Sweden is providing two types of Crowdfunding services:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Two platforms are currently offering crowdfunding according to an Equity Model. None have any license or permit for their business. Their approach is to act strictly as investment brokers, without providing any advice on the investment, and ensure that no prospectus needs to be prepared. Neither platform handles transferring of investment from the investor to project company.

1.2 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Two platforms operate under a donations model in order to endorse social or cultural projects. Neither platform offer any rewards for donations.

2 Current Regulation of Crowdfunding platforms in Sweden

2.1 Licence under the Swedish Securities Market Act

The Swedish Securities Market Act regulates financial trading of securities, including investment brokering, financial advising and prospectus rules. Platforms that offer subscription to newly issued shares or purchase of existing shares are, as a general rule, considered as marketplaces and shall be subject to financial supervision. A Swedish platform which intends to publically offer equity crowdfunding must apply for a license to conduct financial services with the S-FSA. Notably, platforms that only present investment offer to a closed group of investors (maximum 200 investors), or co-operate with a financial institution regulated by the S-FSA, are not subject to any license requirement.

Platforms operating under a donations or rewards model are not subject to the Swedish Securities Market Act since no financial investment or return is offered.

2.2 Licence under the Swedish Payment Services Act

The Swedish Payment Services Act is based on the Payment Services Directive. Any transfer of funds through the crowdfunding platform operator, i.e. the platform operator receives all investments and then passes the funds to the project company, would constitute a service regulated by Swedish Payment Services Act. Exemptions from the Swedish Payment Services Act are limited and thus an operator would need to apply with the Swedish Financial Supervisory Authority ("S-FSA") to receive status as a registered payment service provider.

2.3 Prospectus requirements

According to the Swedish Financial Instruments Trading Act all public offerings are subject to prospectus requirements. In order to facilitate for smaller companies exemptions have been made where the offering does not exceed EUR 2 500 000 within a period of twelve 12 months. Crowdfunding platforms are not subject to the prospectus requirement themselves as they only work as an intermediary the obligation instead falls on the legal entity with the actual offering, i.e. the project companies. However, a platform should inform and alert project companies if prospectus is required.

2.4 Possible additional Regulations

2.4.1 Swedish Companies Act

The Swedish Companies Act allows two different types of limited liability companies – "public" or "private". Private companies are allowed to have a lower share capital but may raise capital through public share offerings. Opposite applies to public companies. Majority of all start-ups are, due to the lower share capital requirements, formed as "private" limited liability companies. According to ch.1 para. 7 of the Swedish Companies Act securities offerings in a private liability company directed to less than 200 investors are allowed (as it does not constitute a "public" offering).

No restrictions apply to share offerings in limited liability companies formed as "public".

2.4.2 Other common regulations to which the operator of a Crowdfunding platform may be subject to include:

- Swedish Personal Data Act;
- Swedish Anti-Money Laundering Act;
- Swedish Deposit-taking Activities Act;
- Swedish Consumer Credit Act.



3 Possible regulation of Crowdfunding platforms under the AIFMD regime in Sweden

3.1 Status of AIFMD implementation

The European Alternative Investment Fund Managers Directive ("AIFMD") has been fully implemented as of 22 July 2013.

3.2 Definition of an alternative investment fund ("AIF")

The definition from the AIFMD has been directly translated and implemented in the Swedish act, i.e. an AIF shall be defined as a collective investment undertaking which raise capital from a number of investors in accordance with a defined investment policy for the benefit of the same investors. Undertakings not directed to the public shall be excluded.

3.2.1 Project Company seeking funding

The S-FSA has published guidelines in which they state that a limited liability company seeking funding to conduct a "normal" business (supply of goods/services, production etc.) shall not constitute an AIF. A project company should therefore as a general rule not be considered as an AIF, although certain exemptions could be possible depending on the project company's intended business.

3.2.2 Crowdfunding Platform

The current platforms do not constitute AIF's as they do not raise the capital themselves. However it is possible a future Crowdfunding platform that raise the capital themselves and thereafter act as a representative for the investors towards the project company, and during the project, would fall within the scope of the AIFMD. Such service is yet to be launched in Sweden.

4 Conclusion

Crowdfunding is a limited phenomenon in Sweden. Equity Crowdfunding platforms are under financial supervision and only allowed, as a stand-alone business, if designed to target limited liability companies formed as "private" where investments are offered to a closed group of investors (not more than 200 investors per project company). In all other situations a financial license from S-FSA is required. The Swedish Government has however expressed interest in crowdfunding as an investment tool and it is not improbable that exemptions or targeted regulations intended to facilitate business for crowdfunding platforms may be introduced in the coming years.



5 Contact details of the authors:

Mats Hellström
Managing Partner
mats.hellstrom@hellstromlaw.com



Fredrik Sandström
Associate
fredrik.sandstrom@hellstromlaw.com



Hellström Advokatbyrå KB
Kungsgatan 33, XV
P.O Box 7305
S-103 90 Stockholm
Sweden

Telephone: +46 8 22 09 00
www.hellstromlaw.com

HELLSTRÖM
Lawyers you want on your side



SWITZERLAND



1 Current Market of Crowdfunding Platforms in Switzerland

In Switzerland, there are three main types of Crowdfunding models and most active platforms just offer one of these three types of services. Compared to the United States of America, Germany and France, the Crowdfunding scene in Switzerland is rather small but the average commitments seem to be higher than elsewhere.

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

Although exact figures are not available, the Equity Model is, by volume of funds invested, the most important model in Switzerland to date. However, the number of platforms is still small – at the end of August 2013, three platforms offered an Equity Model.

The platforms operating on the Equity Model require that a minimum of funds is committed before the actual investing round is closed. Investors are provided, either through the platform or directly through the company, with the investment documentation to be signed by each investor and the funds are then normally transferred by each investor to a blocked account opened by the company with a bank in Switzerland. The platforms offering the Equity Model are normally not involved in the transfer of funds.

Referring to rulings from the Swiss Financial Market Supervisory Authority (FINMA), two platforms explicitly state that they are not subject to the supervision of FINMA.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

These platforms bring together lenders and borrowers. Whereas one platform focuses on loans to corporations, the other tries to facilitate loans to individuals. Unlike the platforms operating an Equity Model, platforms operating a Lending Model assist the parties in the flow of money.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

Especially in the art, music, film, sport and design scene, there are several platforms operating with the Donations or Rewards Model whereas the donators receive either a predetermined reward or donate without knowing what the reward might be. The funding of community projects is rather unknown in Switzerland. There are various platforms which operate under either a Donations or Rewards Model.

2 Current Regulation of Crowdfunding Platforms in Switzerland

2.1 Licence under the Swiss Federal Act on Banks and Savings Banks (*Banking Act*)

General Rule

The Swiss Federal Act on Banks and Savings Banks (*Bankengesetz*, Banking Act) and its implementing ordinance, the Banking Ordinance (*Bankenverordnung*, Banking Ordinance), require natural persons and/or legal entities (collectively Persons, and each a Person) mainly active in the financial sector intending to either (i) accept deposits from the public on a professional basis, or (ii) recommend themselves for financing any number of persons or companies (with which they do not form an economic unit of their own) with public deposits or by refinancing themselves from five or more banks, to obtain a licence from FINMA. This licensing requirement also applies in case any Person intends to advertise any such services (in advertisements, prospectuses, circular letters, electronic media or similar publication media).

A Person is considered to act on a professional basis in case it constantly accepts more than 20 deposits from the public. The Banking Ordinance does not contain a positive definition of deposits; it does, however, contain a list of exemptions for funds not qualifying as deposits. According to this list, *inter alia*, the acceptance of (i) funds provided in consideration of a contract, due to the transfer of property or the rendering of a service, or (ii) funds which are transferred as a security are not considered as deposits.

Legal Consequences for the Crowdfunding Platforms in Switzerland

In order not to be required to obtain a banking license from FINMA, a Crowdfunding platform in Switzerland should generally refrain from collecting funds from investors on its own account and from keeping any accounts in the name of the investors, e.g. to keep accounts for the investors from which funds (for the purchase of shares or for loans to be granted) are debited and directed to the companies and to accept payments (interest, principal, or dividends) from the companies in the name and for the account of such investors.

Under the current Swiss legislation, it is not clear whether the purchase of equity securities and the provision of financing aids for the account of third parties qualifies as financing under the Banking Act. Crowdfunding platforms should therefore generally be cautious in providing such services for the account of investors (e.g. to purchase shares or to grant loans to the companies in the name and for the account of the investors).

2.2 Licence under the Federal Act on Collective Investment Schemes

2.2.1 General Rule

According to the Federal Act on Collective Investment Schemes (*Kollektivanlagengesetz, CISA*), all Persons responsible for the management of collective investment schemes, the safekeeping of assets held in such schemes as well as the distribution of such schemes to retail (i.e. non-qualified) investors are required to obtain an authorization from FINMA.

Collective investment schemes are defined as assets raised from several investors for the purpose of collective investment, and which are pooled and collectively managed for the account of such investors.

Distribution is generally defined as any offering of and advertising for collective investment schemes and covers any kind of activity which is aimed at investors acquiring collective investment schemes.

An exemption to the above authorization obligation applies if (i) the funds are solely invested in one operating company which is active in a manufacturing, trade or service business and generates its revenues and profits with such business (and not solely by way of committing funds), or if (ii) the investment decisions are primarily made by the investors and not by the management of the investment scheme.

Loans granted to a collective investment scheme should in principle also be outside the scope of the CISA. However, each case needs to be assessed globally, i.e. taken as a whole it must in a specific case be excluded that a loan (due to its risk profile or repayment schedule) can be characterised as an investment in a collective investment scheme.

2.2.2 Equity Model

To be outside the scope of the collective investment scheme regulation, an equity based Crowdfunding platform should thus be set up in a way that it is able to primarily profit from the exemption applicable with regard to investments into operating companies; i.e. it should introduce possible investors to operating companies only and should refrain from any activities which could result in the platform pooling or managing any funds received from the investors for the account of such investors and subsequently investing them collectively into a company via the platform itself. It should be active only as an intermediary for purposes of information exchange (e.g. names, phone numbers and other contact details) with regard to possible direct investments into specific operating companies and not directly or indirectly transfer any funds from investors to companies.



2.2.3 Lending Model

A debt based Crowdfunding platform should generally avoid the appearance as a collective investment scheme, i.e. the management of third party funds. Therefore and in order not to be subject to regulation by FINMA, such platforms should avoid (i) accepting funds from investors, (ii) pooling such investments from investors in the name of the platform in a way that the investments cannot be personalized anymore, and (iii) subsequently granting such investments as loans to a company advertising on the platform.

With regard to debt based Crowdfunding platforms, the situation is basically the same as described above with regard to Equity Models; i.e. loans granted directly to operating companies or to private persons only (and in particular not to the operator of the platform for further on lending) should fall outside the scope of the CISA. Even if loans were to be granted by an investor to a collective investment scheme presented on the platform (but operated by a party other than the operator of the lending platform), the operator of the platform should still not be subject to the CISA, because granting a loan to a collective investment scheme should not be qualified as distributing a collective investment scheme.

Further, the investment decision to grant any funds to a specific company should always remain with and be made by the investor itself and not by the platform. Contractual arrangements appearing as third party management of funds should generally be avoided.

2.2.4 Donations or Rewards Model

Normally, these platforms are structured in a way that the contributions are not investments related to a direct return, if any, and therefore such platforms do not fall under the collective investment schemes regulations.

2.3 Federal Act on Stock Exchange and Securities Trading (SESTA)

2.3.1 General Rule

Pursuant to the Federal Act on Stock Exchange and Securities Trading (*Börsengesetz*, SESTA), all Persons qualifying as securities dealers are required to obtain an authorization from FINMA. A securities dealer is defined as a Person or partnership who, in its professional capacity, (i) buys and sells securities on the secondary market, either for its own account with the intent of reselling them within a short period of time or for the account of third parties, (ii) publicly offers securities on the primary market, or (iii) creates derivatives and offers them to the public.

Securities dealers include in particular own-account dealers (dealers who, in their professional capacity, trade in securities for their own account on a short-term basis), client dealers (dealers who, in their professional capacity, trade in securities in their own name for the account of clients) and issuing houses (securities dealers who, in their professional capacity, underwrite securities issued by third parties on a firm basis or against commission and offer them to the public on the primary market).

Furthermore, SESTA requires a stock exchange to obtain a license from FINMA. A stock exchange is defined as an organization set up solely for the purpose of securities trading (e.g. shares and bonds) on the secondary market, which enables the simultaneous exchange of offers of securities (and not only the exchange of price-related information) among a number of securities dealers as well as the execution of such transactions. In addition, the Federal Council may subject organizations which are, in whole or in part, similar to exchanges to the SESTA or exempt certain exchanges or similar organizations from the application of the SESTA whenever justified by the objectives of the SESTA. Exchanges, as well as organizations similar to exchanges, are organizations which facilitate secondary market transactions (and not the offering of new securities).

2.3.2 Legal Consequences for Crowdfunding Platforms in Switzerland

In the light of the foregoing, Crowdfunding platforms should, *inter alia*, refrain from the following business activities in order not to be considered as a securities dealer:

- a. Trading of shares (or similar participation rights) in companies presented on the platform in the name and for the account of the investors and, in particular, not (i) maintain any accounts for the settlement of transactions for such investors by itself or with third parties, and/or (ii) hold any shares (or similar participation rights) on behalf of the investors in safe custody with itself or with third parties but in its own name; and
- b. Underwriting any kind of securities (in particular shares or bonds) newly issued by companies presented on the platform on a firm basis or against commission and subsequently publicly offer such securities to investors.

Furthermore, a Crowdfunding platform should generally be careful not to qualify as a stock exchange or an exchange-like institution in connection with additional services offered to facilitate the execution of investments or subsequent divestments (i.e. services other than providing information on possible investments). Normally, Crowdfunding platforms should not qualify as a stock exchange or exchange-like institution because they present direct investment into new (not existing) shares and thus facilitate primary market transactions. Moreover, even if the investments presented on the platform were investments to be made on the secondary market (i.e. into existing securities), the platforms should not qualify as exchanges (however, the analysis might be different with regard to exchange-like institutions), as such platforms do not (yet) have the capability to enable the simultaneous exchange of offers, the conclusion of the respective contracts or the settlement of such contracts concluded over the platform.

2.4 Anti-Money Laundering Act

2.4.1 General Rule

Pursuant to the Swiss Anti-Money Laundering Act (*Geldwäschereigesetz*, AMLA), Persons providing services as financial intermediaries must be affiliated to a recognized self-regulatory organization or need to obtain a license from FINMA for their professional business activities. In addition, financial intermediaries must comply with the statutory provisions and procedures of the AMLA, e.g.

verification duties regarding the identity of the customer (and the beneficial owner), duties to clarify and to keep records, and certain organizational measures.

Financial intermediaries are in particular Persons who, in their professional capacity, accept or keep third party funds or who assist in the investment or transfer of such funds, such as Persons carrying out credit transactions, providing services for payment transactions or assets, or securities managers and Persons making actual investments in their capacity as investment advisors. However, Persons solely providing investment advisory services (including platforms who act as intermediary without assisting in any kind of the flow of funds) are not considered as financial intermediaries.

2.4.2 Legal Consequences for the Crowdfunding Platforms in Switzerland

Whether an operator of a Crowdfunding platform (irrespective of the model operated) falls under the money laundering regulation very much depends on whether it limits its services to (i) providing information on possible investments, (ii) acting as intermediary with regard to possible transaction, and/or (iii) provides solely advisory services (in each case without assisting in the transfer or flow of funds), in which cases the money laundering regulation should theoretically not apply.

Other services offered in connection with investments presented on a platform, such as (i) services facilitating the execution of a transaction (e.g. assisting investors and/or companies or borrowers in the investment or transfer of funds), (ii) accepting or keeping funds of investors and/or companies or borrowers, (iii) the platform making investments on behalf of investors, or (iv) the platform enabling the operator of the platform to dispose of funds or financial assets (even on the basis of specific instructions only), need to be carefully analyzed. In particular, services provided by the operator of the platform in connection with (i) the flow of funds, (ii) keeping securities, or (iii) keeping accounts of investors will most likely bring a platform operator within the scope of the money laundering regulations as it will be considered a financial intermediary subject to the AMLA.

2.5 Consumer Credit Act

2.5.1 General Rule

According to the Swiss Consumer Credit Act (*Konsumkreditgesetz*, CCA), a Person regularly acting as a financial intermediary for consumer credit agreements is required to obtain an authorization from its canton of residence for the provision of such services.

A *consumer credit agreement* is defined as an agreement according to which a Person who regularly grants credits in the course of its business (creditors) grants or promises to grant a credit to a consumer in the form of a deferred payment, a loan or a similar financial accommodation. Credit agreements entered into by creditors who do not regularly grant loans are not considered to be *consumer credit agreements*. Furthermore, certain consumer credit agreements are excluded from the scope of the CCA, in particular those with an amount of less than CHF 500 or exceeding CHF 80,000, those with a duration of less than three months or those repayable in maximum four instalments during a period of twelve months.



Besides the authorization requirement for intermediaries mentioned above, the CCA requires that *consumer credit agreements* comply with certain material and formal requirements and that the consumers shall not be obliged to pay any compensation to a credit intermediary.

2.5.2 Legal Consequences for Crowdfunding Platforms in Switzerland

Crowdfunding platforms (including debt-based platforms) do normally not grant credits falling under the definition of a consumer credit mainly because the lenders normally are not Persons who regularly grant credits in the course of their business. However, should the credit agreements offered on the platforms be qualified as *consumer credit agreements*, the operators of such platforms would most likely qualify as intermediaries for consumer credit agreements and thus require authorizations from their canton of residence. To avoid such qualification, operators of lending platforms exclude lenders who regularly grant credits in their professional capacity.

2.6 Prospectus Requirements

In case equity securities or bonds are publicly offered for subscription, the issuing company needs to establish and issue an issue prospectus containing certain information regarding, *inter alia*, the company and its business activities. Generally speaking, any invitation to subscribe for equity securities which is not addressed solely to a limited number of Persons is considered as a public offer.

According to our knowledge, Crowdfunding platforms in Switzerland are not making any public offers for their own equity or debt securities. Therefore, they are generally not subject to the prospectus requirements under Swiss law. If in a particular case, an issue prospectus is required, the company itself would be the one obligated to produce, issue and publicly distribute such prospectus to the investors.

Despite the obligation to produce an issue prospectus lying with the companies publicly offering their shares, one needs to keep in mind that anyone who, upon the issuance of shares, intentionally or negligently contributed to an issue prospectus (or similar distribution material) containing incorrect, misleading or incomplete information, is liable to the acquirers of such newly issued and publicly sold shares for any damage caused in connection with the public offer of such shares. Accordingly, operators of platforms should put adequate measures in place to limit the risk of such prospectus liability.

2.7 Future Financial Services and Markets Act

In Switzerland, it is currently intended to implement a new Financial Services and Markets Act (*Finanzdienstleistungsgesetz*, FSMA). According to this new legislation, all Persons (including not authorized market participants) providing financial services on a professional basis must comply with the same standards of care regarding their respective clients. Such laws will have implications for all providers of financial services in Switzerland, including Crowdfunding platforms. However, as the exact terms as well as the status of the implementation of the FSMA is not sufficiently clear yet, this note does not address the implications this new regulation might have for Crowdfunding platforms.



3 Conclusion

There is currently no specific legislation or regulation in Switzerland explicitly addressing Crowdfunding platforms in Switzerland. However, there are several laws and regulations which may, under certain circumstances, be applicable to Crowdfunding platforms.

As a matter of fact, equity based Crowdfunding platforms are basically structured as not to be regulated by FINMA. Some platforms obtained a negative statement from FINMA, confirming that the platforms as operated do not fall under the scope of application of neither the Swiss Federal Act on Banks and Savings Banks, the Federal Act on Stock Exchange and Securities Trading, the Federal Act on Collective Investment Schemes nor the Swiss Anti-Money Laundering Act.

However, depending on the services provided, Crowdfunding platforms (irrespectively whether they operate an Equity or Lending Model) may be subject to one or more of the aforementioned regulations and may require in particular a banking license, a license as securities dealer and/or a licence under the CISA.

Furthermore, platforms offering services aimed at facilitating the execution of transactions need to be carefully analyzed under the Swiss money laundering rules. In particular services in connection with (i) the flow of funds, (ii) the keeping of securities, (iii) the keeping of accounts of investors, or (iv) the enabling of the operator of the platform to dispose of funds (even on the basis of specific instructions only) may, unless specific exemptions apply, be considered as services of a financial intermediary within the scope of the AMLA. One consequence would be that such financial intermediary must be affiliated to a recognized self-regulatory organization or need to obtain a license from FINMA for its professional business activities

Besides, for debt based platforms to be outside the scope of the CCA, it is important that (i) the operators of the platform themselves do not provide any loans, and (ii) any lenders who regularly (i.e. in their professional capacity) grant loans are excluded from the offering of loans over the platform.



4 Contact details of the author:

Michael Trippel
Partner
Michael.Trippel@baerkarrer.ch



Bär & Karrer AG
Baarerstrasse 8
CH-6301 Zug
Switzerland

T: +41 58 261 50 00
www.baerkarrer.ch



Romina Alessandra Brogini
Associate
romina.brogini@baerkarrer.ch





UNITED KINGDOM



1 Current Market of Crowdfunding platforms in UK

There are three broad types of Crowdfunding, each distinguishable by the return that the funder receives:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

In the UK, the financial services regulatory regimes for corporate finance business and investment funds both tend to shape the structure of Equity-based Crowdfunding platforms. However, as both regimes generally only cater for professional investors, the Financial Conduct Authority ("FCA") has announced that new rules to be published in October 2013 will cater for Equity Crowdfunding (in addition to developing the proposals to create a regime for the Lending Model discussed below). At present some platform operators make use of exemptions from the regulatory regime, whilst others have obtained authorisation from the FCA (or its predecessor, the Financial Services Authority). The new FCA rules will only apply to regulated firms and appears likely to require such platforms to ensure they assess the investment sophistication of their investors. The FCA is also likely to start policing firms attempting to operate outside the scope of regulation more strictly (e.g. by issuing "Cease and Desist" letters where it does not believe the exemption relied upon is legally tenable).

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

The making of non-consumer loans has not, to date, been treated as a regulated activity (because loans are not typically regarded as "transferable securities") and so the Crowdfunding Lending Model has developed quickly as an alternative to bank lending. However, on 25 July 2013 the UK Government created the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013 to make operating an electronic system in relation to lending a regulated activity with effect from 1 April 2014. The FCA is expected to publish its detailed proposals on the conduct of business requirements attaching to this activity (as well as Equity-based Crowdfunding) in October 2013.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

The Donations or Rewards Model does not involve any form of financial investment or return and so it falls outside the scope of UK financial services regulation (although this too is under review). Crowdfunding originated from Donations or Rewards-based platforms, where the interest of participants was to help a worthy or interesting cause for the sake of being associated with it, rather than to profit financially. As the most established model, it is also the most popular, with platforms

such as US-originated "Kickstarter" being the market leader. The idea of combining worthy causes with financial returns led to the development of the Equity and Lending Models, which are the focal points of several deep-pocketed institutions already operating in the financial services industry.

2 Current Regulation of Crowdfunding platforms in UK

2.1 Licence/approval requirements for Equity Platforms

2.1.1 Financial promotions

The offer of shares, depositary receipts or other securities will generally constitute a financial promotion, namely an invitation or inducement to engage in investment activity. A financial promotion cannot be made to a retail investment audience unless the promotion is communicated or approved by a firm authorised by the FCA or it benefits from an exemption from the financial promotion regime. Much of the Crowdfunding website's contents will comprise an element of financial promotion. Accordingly, either the operator will need to be FCA-authorised or the operator of the platform will need to ensure that an FCA-authorised firm approves the financial promotion. Where an exemption is not available, the contents of the website's financial promotions need to comply with the requirements of chapter 4 of the FCA's Conduct of Business Sourcebook to ensure that they are clear, fair and not misleading. The approval of financial promotions entails costs and administrative burden. Accordingly, it is common for operators to engage an FCA-authorised firm to approve initial investor communications and procure that the promotion of specific investment opportunities fall within one of the two exemptions highlighted below:

- existing shareholders - the platform creates a shareholder relationship with all funding subscribers and a parent/subsidiary relationship with fund-seeking subscribers; and/or
- sophisticated, high net worth and professional investors - the platform assesses the investment sophistication of subscribers or requires the subscriber to certify their own net worth or investment experience.

If the Crowdfunding entails investing in a collective investment scheme, there is a more restrictive financial promotion regime (see below). For this reason, Crowdfunding platforms generally take all necessary steps to ensure that the investment does not constitute a collective investment scheme. The FCA has recently indicated its intention to police Crowdfunding websites much more strictly.

2.1.2 Regulated activities

The Financial Services and Markets Act 2000 requires platform operators to become authorised by the FCA in order to conduct regulated activities. Conducting a regulated activity without authorisation is a criminal offence. Regulated activities associated with Equity Crowdfunding may include:

- bringing about transactions in investments issued by the party seeking funding;

- making arrangements with a view to transactions in investments (which captures referral arrangements even where a specific issuer or investment is not identified); or
- safeguarding and administering investments (custody).

Less commonly, the platform operator could become involved in advising on investments, managing investments or dealing in investments, depending on the business proposition. Where the party seeking funding does not issue shares in a company, platform operators may also need to consider whether they are carrying on the regulated activity of operating a collective investment scheme (see below). Many Equity Crowdfunding platforms are structured using a combination of exclusions and exemptions from the regulated activities regime. Use of these exemptions, particularly where they apply the letter but not the spirit of the law, still carry a high degree of risk, because of the increasingly interventionist and judgemental approach to supervision and enforcement that has been adopted by regulators in the wake of the financial crisis. However, seeking authorisation is a costly and time-consuming process and obliges the regulated firm to comply with the FCA's conduct of business obligations to ensure that the investments arranged through the platform are appropriate for the investor on a case-by-case basis. This can prove challenging when dealing with the low value investor base often associated with Crowdfunding.

2.1.3 Collective investment schemes

Where the profit share being offered to investors is not channelled through a standard corporate issuer/shareholder relationship (e.g. the investor receives a contractual entitlement to profits from a project) the investment may be characterised as units in a collective investment scheme. Crowdfunding generally entails the pooling of investor contributions or the pooling of profits and/or income prior to distribution to the investor, with no involvement in the day-to-day management of the proposition (or project), the two key components of a "collective investment scheme". Operating a collective investment scheme is a regulated activity and must be conducted by an FCA-authorized firm (see the section on regulated activities above). There is potential for either the platform operator or the fund-seeking party to be a person that would conduct the regulated activity, depending on how the arrangements are structured. The promotion of single-project collective investment schemes is subject to greater restriction than the promotion of shares, even when the promotion is communicated or approved by an FCA-authorized firm. The FCA (in Policy Statement 13/3) made rules (coming into force on 1 January 2014) to further reduce the scope for communicating with retail investors and increase the types of investment vehicle caught by the regime to include special purpose vehicles ("SPVs") that pool investments into assets other than non-SPV shares or bonds. Because of this, it is important for Crowdfunding platforms that wish to offer investment opportunities to retail investors to ensure that the offering does not entail a collective investment scheme or an SPV. Existing structures that rely on the creation of a corporate investment vehicle to avoid the collective investment regime could be caught by the new prohibition on promoting SPVs.

2.1.4 Impact of the AIFMD

Since 22 July 2013, the Alternative Investment Fund Managers Directive ("AIFMD") has added a new layer of regulation on top of the collective investment scheme regime. The AIFMD applies where the investment proposition involves an "alternative investment fund" ("AIF"), namely:

- a collective investment undertaking;
- which raises capital from a number of investors; and
- which invests in accordance with a defined investment policy for the benefit of its investors.

Most collective investment schemes will be AIFs, but the AIFMD is also capable of applying to a body corporate that falls outside the CIS regime. The AIFMD imposes a heavy regulatory burden above and beyond the CIS regime on fund operators falling within scope, for example, the requirement to appoint an independent depositary. However, there is a light touch compliance regime for managers with total assets under management of less than EUR 100 million, which most UK-based platforms would fall into if they were managing an AIF. Under the limited compliance regime, the fund manager (e.g. the platform operator) will either be required to:

1. register with the FCA as a small registered AIFM and provide annual reports on the level of its funds under management; or
2. become authorised as a small authorised AIFM and comply with a limited conduct of business and capital requirements regime.

In both cases, the light touch regime does not prohibit the marketing of AIFs to retail investors, provided the AIF is not also an unregulated CIS.

The impact of the Directive is reduced in the UK in comparison with other European jurisdictions that do not apply a light touch regime in respect of fund structures that fall within the EUR 100 million exemption.

2.1.5 Prospectus requirements

The UK Financial Services and Markets Act 2000 (as amended) requires a prospectus to be published where transferable securities are offered to the public. Most Crowdfunding offers fall within an exemption for offers worth less than EUR 5 million in a period of 12 months. There are other exemptions that may be of use if single issues exceed this level.

Section 755 of the Companies Act 2006 also prohibits the offer of shares in a private limited company to the public. The involvement of the platform can be structured so as to reduce the risk of breach.

2.2 Regulatory Regime for the Lending Model

The vast majority of lending platforms are not regulated as financial services businesses, although a small number deal in debentures (which are debt instruments subject to a similar regulatory regime to the Equity Model); others are regulated as mortgage brokers; and several lending platforms are regulated by the Office of Fair Trading as consumer credit brokers (see below for more details). The FCA and the UK Government have published legislation to make "operating an electronic system in relation to lending" by peer-to-peer lending platforms a new regulated activity, covering arrangements with both consumer borrowers and lenders. A Crowdfunding platform operator intending to allow lending through its platform to consumer borrowers will therefore be required to become FCA-authorized unless an exemption applies. At the time of writing, the FCA has yet to develop detailed proposals for the conduct of business requirements associated with these activities,



but the FCA is liaising with interested parties with a view to publishing proposals in October 2013. The debate is focussed on the degree of responsibility a platform should take for vetting individual lenders and borrowers.

2.3 Possible additional requirements

2.3.1 Payment services

The transmission of funds between the investor and the crowd funded business may involve the platform operator providing "money remittance" services under the Payment Services Regulations 2012 (as amended) ("PSRs"). (The PSRs implement in the UK the Payment Services Directive.) A platform operator will require separate FCA authorisation if it is conducting payment services. Operators should however normally be able to rely on the exemption for "commercial agents" under the PSRs on the basis that they have authorisation to negotiate or conclude contracts on behalf of the funder and the fund seeker. Escrow arrangements pose particular payment services issues and have been the subject of specific European Commission guidance.

It is common practice for payment services providers (e.g. Paypal) to withhold a percentage of pledged funds pending satisfaction of any funding criteria stipulated by the fund raiser. This is because the payment services provider has a legal obligation to refund credit card payments in certain circumstances where the transaction is subsequently reversed.

2.3.2 Consumer credit

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 1986) ("CCA") applies to consumer credit or consumer hire agreements where the borrower/hirer is not a body corporate or a partnership of four or more persons. Some CrowdLending platforms therefore restrict lending to bodies corporate. To the extent that consumer borrowers are permitted on a platform, however, a CCA licence will be required and there will be implications for the form and content of the lending agreements also. Regulation of consumer credit is to be transferred from the Office of Fair Trading to the Financial Conduct Authority in April 2014, making consumer credit a mainstream financial services activity.

The application of the consumer credit regime also has implications for whether the platform will fall under the scope of the UK Money Laundering Regulations.

3 Conclusion

The UK Government has set out its proposals to regulate the Lending Model, however, the regulation of Equity and Debt-based Crowdfunding is in a state of flux and development. To ensure the UK's competitiveness does not unduly eradicate the benefits of Crowdfunding, the UK will need to ensure that the regulatory regime it develops for Equity and Debt-based Crowdfunding platforms caters for a wide range of business propositions. Provided this enables execution-only services to run on a disclosure-based regime, this should permit investors and investees to continue to benefit from the pricing models that have seen Investment Crowdfunding to develop in the first place.



EUROPEAN
CROWDFUNDING
NETWORK

4 Contact details of the authors:

David Blair
Head of Financial Regulation
david.blair@osborneclarke.com



Osborne Clarke
One London Wall
London, EC2Y 5EB
Great Britain

T: +44 (0) 20 7105 7056
www.osborneclarke.com



UNITED STATES



1 Current Market of Crowdfunding Platforms in the United States

There are three primary categories of Crowdfunding in the US, as in most of the world:

1.1 The Equity Model (individuals make investments in return for a share in the profits or revenue generated by the company/project)

The Jumpstart Our Business Startups Act (“JOBS Act”), signed into law by the President of the United States after bi-partisan Congressional support on April 5, 2012, formally embraced Crowdfunding in the US. Title III of the JOBS Act (“Title III”) details the fundamental requirements for equity Crowdfunding in the US. Actual offerings cannot commence until the US Securities and Exchange Commission (“SEC”) promulgates rules for such offerings and the Financial Industry Regulatory Authority (“FINRA”) establishes a rule set specifically designed for funding portals (i.e., Crowdfunding websites). Although Ellenoff Grossman & Schole LLP (“EG&S”) has been meeting regularly with both the staff of the Securities and Exchange Commission (“SEC”) and Financial Industry Regulatory Authority (“FINRA”) involved in the rule making process, there is no clear date when the proposed rules will be published.

We distinguish equity “Crowdfunding” from “private placements” that are marketed by “general solicitation or general advertising” but only available to “accredited investors.” Title II of the JOBS Act lifted the historic ban on broad marketing of private placements offered pursuant to the safe harbor requirements of Rule 506 of Regulation D under the Securities Act of 1933, as amended. To date, portals facilitating such offerings restricted access to pre-qualified Accredited Investors via password-only access consistent with SEC guidance issued in the form of letter granting ‘no action’ relief from SEC enforcement. Commencing September 23, 2013, new Rule 506(c) offerings may be conducted over the internet or other wide distribution channels, but sales of securities will be limited to Accredited Investors who demonstrate that they meet net income or net worth standards as defined in Regulation D. Frequently, these offerings are conducted in coordination with a registered broker-dealer. In addition, these offerings may be conducted indirectly through private equity or venture capital fund investment vehicles either as single issuer or basket investments. In March 2013, the SEC issued no action letters to two portals in which angel and accredited investors can identify and target investments, establish a special purpose vehicle for the investment and an affiliate of the portal manages the fund. This has spurred establishment of many similar arrangements pending, or perhaps as a companion to, Crowdfunding.

Many states also have statutes for intra-state offerings. These deals require the issuer and all investors to be based in the state. Commonly, the state conducts a qualitative review of the offering materials before the offering can commence. The deals are limited to \$1 million. Two states have adopted and two states have proposed a state-based version of Crowdfunding. Notably, the state of Georgia has an offering portal dedicated to businesses and investors in the state.

1.2 The Lending Model (individuals lend money to a company or project in return for repayment of the loan and interest on their investment)

Currently, there are peer-to-peer (P2P) and peer-to-business sites operating in the US. However, these facilities follow different regulatory structures than that defined as Crowdfunding in Title III. Kiva.org is a US-based microfinance lending site that operates as a not-for-profit enterprise and does not charge interest to borrowers or promise any return to lenders. Other leading websites for debt-based funding comply with elaborate federal securities registration requirements as well as state licensing and lending laws. Some of the other lending based platforms utilize the Rule 506 offering model described above. However, these models are outside the description of Crowdfunding within Title III.

1.3 The Donations or Rewards Model (individuals provide money to a company or project for benevolent reasons or for a non-monetary reward)

These models have been in operation in the US for many years. Fundraising in exchange for a donation, credit or reward is not subject to any regulation in the US, although there are antifraud statutes and possible implications for the future sale of securities.

2 Current Regulation of Crowdfunding platforms in the United States

2.1 Banking / Financial Service License Requirements

Crowdfunded offerings must be conducted by an SEC registered and FINRA licensed intermediary which can be a funding portal or a broker-dealer. Regulations for funding portals have not yet been published and are expected to be issued in conjunction with or shortly after the offering rules are proposed. The new rules will likely be less stringent than those for broker-dealers because funding portals are not permitted to receive or hold investor funds or securities. Title III bars funding portals from providing investment advice (broker-dealers are permitted to recommend investments). That said, regulators may be prepared to permit funding portals to “curate” offerings posted on their sites as a function of their investor protection responsibilities. Consistent with the limited regulation, funding portals cannot compensate employees, agents or others for solicitation or based on the sale of securities displayed on the website (this “salesman’s stake” is deemed to be the province of the more heavily regulated registered brokers).

2.2 Payment Services Regulation

Title III does not speak to escrow or fund collection mandates. However, consistent with current law, Crowdfunding intermediaries will not be permitted to receive or hold investor funds. The new rules are expected to speak to this concern and will likely impose a requirement for funds to be held by a bank or trust company or other qualified custodian.

2.3 Prospectus requirements

Title III requires issuers to provide investors with the necessary information to appreciate the potential risks and rewards of an investment and offering materials must include the following:

- **Company:** the issuer and its members, including the name, legal status, physical address, the names of the directors and officers holding more than 20 percent of the shares of the issuer.
- **Offering:** the anticipated business plan of the issuer, the target offering amount, the deadline to reach the target offering amount and the price to the public of the securities.
- **Structure:** the ownership and capital structure of the issuer, including terms of the securities of the issuer being offered.
- **Valuation:** how the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and
- **Risks:** the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties.
- **Financial Statements:** The extent to which an issuer must disclose its financial statements varies depending on the aggregate amount offered, including any prior offerings in the preceding 12 months period. For Crowdfunding offerings with an aggregate offering amount up to \$100,000, the issuer must disclose its most recently filed income tax returns and its financial statements certified by the issuer's principal executive officer. For offerings that exceed \$100,000 during the 12 month period but are less than \$500,000, the issuer must provide financial statements reviewed by an independent public accountant. If an aggregate offering amount exceeding \$500,000, the issuer must provide audited financial statements.

The Crowdfunding portals are also required to make available to the SEC and to potential investors any information provided by the issuer no later than 21 days prior to the first day on which securities are sold to any investor.

2.4 Additional requirements

Title III requires Crowdfunding intermediaries to undertake the following additional requirements for crowdfunded offerings:

- Ensure that each investor: (i) reviews such investor-education material; (ii) positively affirms that the he or she understands that there is a risk of losing their entire investment, and that such investor could bear such a loss; and (iii) answer questions demonstrating: (1) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers; and (2) an understanding of the risk of illiquidity.
- Take measures to reduce the risk of fraud, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered.
- Observe annual limits on issuers to sell up to an aggregate of \$1,000,000 of its securities during any 12 month period.
- Ensure that all offering proceeds are only provided to the issuer when the minimum offering amount is met or exceeded.
- Permit investors to cancel their commitments to invest.
- Ensure that no investor exceeds the maximum amount an individual is permitted to invest in such securities.

- Implement measure to protect the privacy of information collected from investors.
- Prohibit its directors, officers, or partners, or such person performing a similar function, from having any financial interest in an issuer using its services.
- Limit Crowdfunding offerings to domestic issuers that are neither reporting companies under the Securities Exchange Act of 1934 nor investment companies.
- Reject any issuers associated with certain “bad actors” from participating, including persons with criminal convictions or court injunction in connection with the purchase or sale securities.

Title III also imposes investor guidelines:

- Annual investment limits - Investors with an annual income or net worth of less than \$100,000 will only be permitted to invest the greater of \$2,000 or 5% of their annual income or net worth in any 12 month period. Investors with an annual income or net worth greater than \$100,000 will be permitted to invest the greater of \$100,000 or 10% of their annual income or net worth. Investors are limited to investing \$100,000 in Crowdfunding issues in a 12 month period.
- Investors are restricted from transferring their securities for one year, subject to certain exceptions, including transfers: (i) to the issuer; (ii) to an accredited investor; (iii) pursuant to an offering registered with the SEC; (iv) or to the investor’s family members.

Finally, and somewhat incongruously, issuers and funding portals may not advertise specific investment opportunities. Prospective investors can be driven to the funding portal, but not to any particular raise.

3 Possible Regulation of Crowdfunding Platforms under the AIFMD Regime in the United States

Since it is not part of the EU, the US is not required to adopt the AIFMD. However, to the extent that a US-based investment adviser markets AIFs in the EEA, manages or subadvises EEA domiciled AIFs, or is outside the safe harbor for “reverse solicitation” in a jurisdiction, it may need to comply with the local rules and requirements. More to the point, the Title III requires that only an operating company can conduct an offering under US law. As such, AIFMD would not apply to US crowdfunded offerings.

4 Conclusion

Small and medium sized businesses and the market participants who support their financing eagerly await the SEC’s action to promulgate rules under Title III of the JOBS Act. Rule 506 platforms have already consummated tens of millions of dollars in funding of entrepreneurs in the pre-Title II period and all indications are that such activity is only going to increase on September 23, 2013 with the implementation of the Title II regulations. Title III which enables entrepreneurs to receive financing from non-accredited investors will broaden the market for such offerings. This is demonstrated by the following statistics: (i) seventy percent of all venture capital in the US is deployed to opportunities in New York, California, and Massachusetts and (ii) over ninety-five percent of all venture funding is for opportunities managed by men. Crowdfunding, when it becomes available to



startups and the public, will more efficiently enable entrepreneurs across the country to raise much needed capital from friends, family, customers, and others for their community-based businesses and high-growth technology opportunities. On October 23, 2013 the SEC approved and issued the Proposed Rules in a 5-0 vote of the Commissioners. FINRA issued their Proposed Rules as well. Much of the Proposed Rules confirm market expectations, but particular concerns remain in relation with the overall regulatory burden and costs associated with complying, the inability of the Funding Portal to curate deals on their websites, as well as, that Funding Portals would be subject to underwriter-like liability for the material misstatements and omissions of the entrepreneur. Final regulations and implementation are not expected until sometime in 2014.

5 Contact details of the authors:

Douglas S. Ellenoff
Founder and Partner
Ellenoff@EGSllp.com



Ellenoff Grossman and Schole LLP
150 East 42nd Street
New York, NY 10017
United States





+1 212 370 1300
www.EGSllp.com

EGS
Ellenoff Grossman & Schole LLP



Summary – Regulation of Crowdfunding in Europe, North America and Israel

Summary – Regulation of Crowdfunding in Europe, North America and Israel

Country Regulation	Austria 	Belgium 	Bulgaria 	Canada 
General regulation	<ul style="list-style-type: none"> If a Crowdfunding platform offers securities or investment products, the operator of the platform provides financial services in the sense of the WAG 2007 → the commercial provision of various investment services requires a license from the FMA → Alternatively, the operator of a Crowdfunding platform can cooperate with a securities company or a credit institution as an auxiliary person The commercial collection of loans, which finance the 	<ul style="list-style-type: none"> Crowdfunding platforms facilitating direct investment in financial instruments are likely to require a licence under the Act regulating investment services firms – authorization and supervision by the FSMA (or Belgian National Bank, depending on the nature of their activities) save if no compensation is charged for these services Onward trading in financial instruments also requires a licence 	<ul style="list-style-type: none"> The operator of the platform may be required to be licensed / registered either as a financial or a credit institution by the Bulgarian National Bank in accordance with the Law on Credit Institutions, respectively with the Law on Payment Services and Payment Systems. Legal entities providing public offering of securities shall be required to register as a public joint-stock company in compliance with the Public Offering of Securities Act. 	<ul style="list-style-type: none"> Non-Equity Crowdfunding platforms are not subject to registration under Canadian securities law. Equity Crowdfunding platforms are regulated under Canadian securities law. An Equity Crowdfunding platform that seeks to raise capital in reliance on the 'offering memorandum exemption' (the OM exemption) will be required to be registered in each jurisdiction in Canada where it does business as a 'dealer', such as an 'exempt market dealer'.

	<p>on-going business, can constitute a deposit business in the sense of the BWG → such business is reserved to credit institutions and requires a license of the FMA.</p> <ul style="list-style-type: none"> Depending on the structure in detail: sound arguments argue that contributions under Donations/Rewards Model do not constitute investment products 	<ul style="list-style-type: none"> The collection of limited public refundable funds does not fall within the banking monopoly if sufficient safeguards are provided to guarantee that the funds will only be used to refund the crowd or finance the project The Lending (and Rewards) Model uses debt instruments, which are not regulated by the Act regulating investment services firms The Donation Model is least prone to financial regulation 	<ul style="list-style-type: none"> Legal entities facilitating public offering of securities or investment products could be required to register as an investment intermediary under the Markets in Financial Instruments Act. The Financial Supervision Commission is responsible to supervise both the public offering of securities and the investment intermediaries. 	<ul style="list-style-type: none"> If the Ontario Proposal is adopted, it is anticipated that the platform will be registered as a 'restricted dealer' under Ontario securities law. If the Saskatchewan Proposal is adopted, the platform would not be required to be registered under Saskatchewan securities law but forms would be required to be filed by the platform and certain individuals related to the platform with the Saskatchewan securities regulatory authority and the platform will have to satisfy certain conditions in reliance on the prospectus exemption described in the Saskatchewan Proposal.
--	--	---	--	--



<p>Prospectus requirement</p>	<ul style="list-style-type: none"> Prospectus requirement according to the BWG for the public offering of securities or investment products. If the prospectus includes securities for admission to the stock exchange, also the KMG can apply. The general prospectus requirements do not apply in exceptional cases, inter alia for offering security papers or investments products within the European Union for a total consideration of less than EUR 250.000, calculated over a period of twelve months. Depending on the structure in detail: no prospectus requirements for subordinated loans or 	<ul style="list-style-type: none"> Prospectus requirement for offering investment instruments (a term broader than financial Instruments, as it encompasses contract-based debt instruments) Threshold: EUR 100.000 per issuer within 12 months Other thresholds <ul style="list-style-type: none"> directed at fewer than 150 natural or legal persons per member state, other than qualified investors; where the total consideration per investor and per offer is more than EUR 100,000, calculated over a period of 12 months 	<ul style="list-style-type: none"> Prospectus requirement for companies which publicly offer securities to investors Threshold: EUR 100.000 per issuer within 12 months 	<ul style="list-style-type: none"> Equity Crowdfunding is permitted under the OM exemption in all jurisdictions in Canada except Ontario, where it is not permitted, and investors can invest as much as they want under the BC model, while investors under the AB model can invest up to \$10,000 unless they are an 'eligible investor' and then there is no limit. There is no maximum amount that an issuer can raise under the OM exemption. The Ontario Proposal sets out various requirements in reliance on the proposed Equity Crowdfunding exemption including that investors cannot invest more than \$2,500 in any one investment or \$10,000 in any calendar year and
--------------------------------------	--	---	--	---



	contributions under Donations/Rewards Model.			<p>issuers cannot raise more than \$1.5 million in any 12-month period.</p> <ul style="list-style-type: none"> The Saskatchewan Proposal sets out various requirements in reliance on its proposed Equity Crowdfunding exemption including that investors cannot invest more than \$1,500 per offering and issuers cannot raise more than \$150,000 in any 6-month period
AIFMD-regulation	<ul style="list-style-type: none"> Typical start-up or developing companies in general do not constitute an AIF. Alternative investment funds are facilitated when the assets acquired through leverage do not exceed a total of 	The AIFMD has not yet been transposed in Belgium. It is not yet clear what kinds of platforms might fall under the legislation.	<ul style="list-style-type: none"> AIFMD has not been implemented in the Bulgarian legislation so far. Pursuant to the draft of the respective <i>Law on the activities of collective investment schemes and other collective investment undertakings</i>, the Crowdfunding financing shall not 	Canada is not an EU member state and therefore the European Alternative Investment Fund Managers Directive is not applicable in Canada.







	<p>EUR 100.000.000,-- or total assets do not exceed EUR 500.000.000,-- ("<i>de minimis-barrier</i>").</p> <ul style="list-style-type: none"> • A "Project Company" may, under various circumstances, constitute an AIF. • Depending on the structure in detail, Crowdfunding by means of subordinated loans or contributions under Donations/Rewards Model should not entail an AIF. 		<p>fall within the scope of its application.</p> <ul style="list-style-type: none"> • It shall apply to closed-end investment companies only, as far as the special investment purposes companies are excluded from the scope of application of the Directive. 	
Payment service regulation	<ul style="list-style-type: none"> • Transfer of funds between investors and the operator of a Crowdfunding platform can constitute remittance services in the sense of the ZaDiG → authorisation by the FMA 	<ul style="list-style-type: none"> • Transfer of funds through operator may constitute money remittance service • → Belgian National Bank licence required 	<p>Transfer of funds through operator may constitute money remittance service – in future, the operator of the platform may be required to be licensed / registered either as a financial or a credit</p>	<ul style="list-style-type: none"> • A platform that is a registered as an EMD would be permitted to receive or hold investor funds in trust. This is what EMDs presently do when they engage in any type of private placement



	<p>required.</p> <ul style="list-style-type: none"> Exception of the applicability of the ZaDiG, if the operator of a Crowdfunding platform acts as a commercial agent. Alternatively the operator could use an external provider or partner for processing payments. 	<ul style="list-style-type: none"> "Commercial agents" exemption probably does not apply to Crowdfunding platform operators 	<p>institution by the Bulgarian National Bank in accordance with the Law on Credit Institutions, respectively with the Law on Payment Services and Payment Systems.</p>	<p>in Canada including a Crowdfunded offering under the OM exemption.</p> <ul style="list-style-type: none"> It is not clear whether a platform that may be registered as restricted dealer would also be permitted to receive or hold funds under the Ontario Proposal, however, it is expressly contemplated under the Saskatchewan Proposal.
Consumer credit regulation	<p>If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements</p>	<p>If consumers are borrowers under the platform, then licence needed as a consumer credit professional and formal contractual and pre-contractual requirements apply</p>	<p>At present, lending agreements, including between related parties or between a local and foreign entities are subject to a registration under the Currency Act in a special register at the Bulgarian National Bank.</p>	<p>Certain consumer protection legislation would apply to P2P lending platforms.</p>



Further possible requirements	<ul style="list-style-type: none"> • Trade Law (<i>Gewerbeordnung</i>) • Law regarding the Supervision of Securities (<i>Wertpapieraufsichtsgesetz 2007</i>) • Consumer Protection Act (<i>Konsumentenschutzgesetz</i>). 	<ul style="list-style-type: none"> • The Act on Market Practices and Consumer Protection • Money Laundering Provisions • The Privacy Act • The Consumer Credit Act 	<ul style="list-style-type: none"> • The Commerce Act • The Law on Measures against Money Laundering • The Currency Act 	<ul style="list-style-type: none"> • <i>Income Tax Act</i> (Canada) and its regulations and possibly other federal and provincial income tax legislation • <i>Proceeds of Crime (Money Laundering) and Terrorist Financing Act</i> (Canada)
--------------------------------------	---	--	--	---

Country	Croatia	Czech Republic	Denmark	Estonia
Regulation				
General regulation	<ul style="list-style-type: none"> • No operational Crowdfunding platforms and no regulatory practice <p>Equity Model and a Lending Model using debt securities are potentially subject to a regulated regime under local securities and investment funds laws → HANFA and/or CNB authorisation and registration required</p> <ul style="list-style-type: none"> • Depending on the structure, Donations/Rewards Model is not subject to financial services regulation 	<ul style="list-style-type: none"> • A project company or a Crowdfunding platform acting under the Equity Model can be qualified as an Investment Fund under the AMCIF → licence from the Czech National Bank required • A project company or a Crowdfunding platform acting under the Lending Model is not a regulated entity → no licence required • A project company or a Crowdfunding platform acting under the Donations or Rewards Model enjoys an exemption under the AMCIF and cannot be 	<ul style="list-style-type: none"> • If a Crowdfunding platform facilitates offering of securities or investment products the operator of the platform renders financial services, which is subject to a licensing requirement • the Donations or Rewards Models does not involve any form of financial investment or financial return and therefore is not within the scope of the Danish financial regulation 	<ul style="list-style-type: none"> • If Crowdfunding platform organises offering of securities or acts as a securities broker, it provides investment service → FSA authorisation required • Crowdfunding platforms operating the Lending Model use exemptions from regulated activities regime (acting as broker and not as a lender or a deposit holder) • Crowdfunding platform operating the Donations/Rewards Model is not subject to financial services regulation • No Crowdfunding platforms are currently supervised by the FSA



		qualified as an Investment Fund → no licence required		
Prospectus requirement	<ul style="list-style-type: none"> Prospectus requirement for offering of securities Threshold: EUR 5 million EU-wide per issuer within 12 months 	<ul style="list-style-type: none"> Prospectus requirement for the offering of investment securities (i.e. shares, bonds, securities substituting shares or bonds, securities enabling the acquisition or sale of shares or bonds, certain derivatives, or similar securities) Threshold: EUR 1.000.000 per issuer for investment securities offered in any member state of the European Union within a period of 12 months 	<ul style="list-style-type: none"> Prospectus requirement for offering of securities or investment products Threshold: EUR 1.000.000 per issuer within 12 months 	<ul style="list-style-type: none"> Prospectus requirement for public offering of securities Threshold: no threshold General regulation applies if EUR 5 million per issuer within 12 months For securities the issue of which is under this threshold, specific prospectus requirements provided in a regulation of the Minister of Finance apply







AIFMD-regulation	<ul style="list-style-type: none"> • Legislation only recently implemented and no regulatory practice • Typical start-up company seeking funding for regular operations should generally not constitute an AIF • Crowdfunding structure could constitute an AIF if it includes profit share arrangements otherwise than in a commercial company • Depending on the structure, funding by non-transferable loans or contributions under Donations/Rewards Model should not entail an AIF • CrowdFunding platforms are likely not AIFM 	<ul style="list-style-type: none"> • An operating company as a start-up or developing company enjoys an exemption under the AMCIF and cannot be qualified as an AIF under the AMCIF → no licence required • A project company/Crowdfunding platform acting under the Equity Model could possibly be qualified as an AIF under the AMCIF → license from the Czech National Bank required • A project company/Crowdfunding platform acting under the Lending Model is not a regulated entity → no licence required 	<ul style="list-style-type: none"> • Crowdfunding provider does not constitute AIF • Total assets under management is less than EUR 100 million 	<p>The AIFMD is not implemented in the national law</p>
-------------------------	---	---	---	---



		<ul style="list-style-type: none"> A project company/Crowdfunding platform acting under the Donations or Rewards Model enjoys an exemption under the AMCIF and cannot be qualified as an AIF under the AMCIF → no licence required 		
Payment service regulation	<ul style="list-style-type: none"> Transfer of funds through operator may constitute money remittance service → Ministry of Finance / CNB authorisation required Exemption for "Commercial Agents" likely to apply to operators of Crowdfunding platforms 	<ul style="list-style-type: none"> The provision of payment services as defined under the Payment Services Act by a project company or a Crowdfunding platform triggers licensing requirements (licence granted by the Czech National Bank) 	<ul style="list-style-type: none"> Transfer of funds through operator may constitute money remittance service Requires Danish FSA's authorisation 	<ul style="list-style-type: none"> Transfer of funds through operator may constitute payment service or money remittance service → FSA activity licence or application to use exemption required "Commercial Agents" exemption may be applicable to operators of Crowdfunding platforms

Consumer credit regulation	<p>If consumer borrowers are permitted on a platform (Lending Model) a consumer credit license is required</p> <p>→ implications for the form and content of the lending agreements</p>	<p>Consumer Credit Act only applies to individuals who are consumers (i.e. individuals who are <u>not</u> going about their business activities or performing their profession in an independent way). Consumer Credit Act does not apply to companies.</p>	<p>If consumer borrowers are permitted on a platform and the Crowdfunding offered is based on the Lending Model there are requirements to the lending agreement pursuant to the Danish Act on Credit Agreements</p>	<p>If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements</p>
Further possible requirements	<ul style="list-style-type: none"> • Croatian Act on Money Laundering and Financing of Terrorism • Croatian Act on Protection of Personal Data • Croatian Companies Act 	<ul style="list-style-type: none"> • Trade Licensing Act • Capital Markets Act • AML Act 	<ul style="list-style-type: none"> • The Danish Act on Measures to Prevent Money Laundering and Financing of Terrorism • Danish Marketing Practices Act • Danish Investment Associations, etc. Act. • Danish Act on Credit Agreements 	<ul style="list-style-type: none"> • The new Investment Funds Act (<i>investeerimisfondide seadus</i>), incorporating AIFMD • Money Laundering and Terrorist Financing Prevention Act (<i>rahapesu ja terrorismi rahastamise tõkestamise seadus</i>) • Estonian Advertising Act (<i>reklaamiseadus</i>) • Estonian Law of Obligations Act (<i>võlaõigusseadus</i>)



Country	Finland	France	Germany	Greece
Regulation				
General regulation	<ul style="list-style-type: none"> At present all Crowdfunding platforms operate outside the regulatory scope without authorisations granted by the Finnish Financial Supervisory Authority Pursuant to current interpretation, the operations of Crowdfunding platforms offering the Equity Model do not require a license Licenses not required for peer-to-peer lending since it has been interpreted to be an unregulated investment product 	<ul style="list-style-type: none"> If a Crowdfunding platform provides advice on a regular basis regarding investments and certain related matters it must be licensed in France (or another EEA member state) as a financial investment adviser (<i>conseiller en investissements financiers</i>). Any lending activity in France, if conducted “habitually” and for profit (à titre onéreux), is a credit operation subject to the French banking monopoly, which can be carried out only by French or “passport” EEA credit 	<ul style="list-style-type: none"> If Crowdfunding platform facilitates offering of securities, investment products (<i>Vermögensanlagen</i>) or shares in collective investment undertakings (<i>Investmentvermögen</i>), the operator of the platform provides financial services → BaFin authorisation required Exemption for investment broking and contract broking only regarding investment products (<i>Vermögensanlagen</i>) or shares in collective investment undertakings (<i>Investmentvermögen</i>) 	<ul style="list-style-type: none"> If Crowdfunding platform facilitates offering of financial instruments, the operator of the platform provides investment services → CMC authorisation required



	<ul style="list-style-type: none"> The use of Donations Model restricted by strict interpretation of the Fundraising Act 	<p>establishments. Loans granted without interest or other consideration are not subject to the banking monopoly. There are exceptions to the banking monopoly for various lending activities by non-profit organisations, which are also permitted to make profit-participation loans under certain conditions.</p> <ul style="list-style-type: none"> Proposed legislation would establish a new category of advisor, a conseiller en investissements participatifs ("CIP") and allow interest-bearing loans to be made by at least 21 individuals acting collectively, up to limits of €250 per lender and €300,000 per borrower. 	<ul style="list-style-type: none"> Depending on the structure in detail: sound arguments that subordinated loans (<i>Nachrangdarlehen</i>) and contributions under Donations/Rewards Model do not constitute investment products (<i>Vermögensanlagen</i>) 	
--	---	---	---	--



<p>Prospectus requirement</p>	<ul style="list-style-type: none"> • Prospectus requirement for offering of securities • Threshold: EUR 1.500.000 per 12 months 	<ul style="list-style-type: none"> • Prospectus requirement for offering of securities or other financial securities: • Threshold: EUR 100.000 per issuer for any 12 month period • Exemptions: private placements to “qualified investors” and up to 149 other investors (for up to 20% of the issuer’s pre-offer capital); issues of at least €100,000 per investor or €100,000 per security; offerings of up to 50% of the issuer’s pre-offer capital, limited to €2.5 million if traded on a MTF or €5 million if not so traded. • Proposed legislation would establish a new exemption from prospectus requirements for offerings of equity or debt securities 	<ul style="list-style-type: none"> • Prospectus requirement for offering of securities or investment products (<i>Vermögensanlagen</i>) • Threshold: EUR 100.000 per issuer within 12 months • Depending on the structure in detail: no prospectus requirements for subordinated loans (<i>Nachrangdarlehen</i>) or contributions under Donations/Rewards Model 	<ul style="list-style-type: none"> • Prospectus requirement for offering of securities • Threshold: securities offerings with total value of less than EUR 100,000 within a time period of twelve (12) months • Exemption from prospectus requirement does not extend to offers of investments which do not qualify as “securities”, within the meaning of Law 3401/2005 • Article 10 Law 876/1979 requires the approval of the CMC in all cases where persons aim to induce the public for investing in any kind of instruments
--------------------------------------	--	--	---	---



		made exclusively via an internet platform operated by a CIP.		
AIFMD-regulation	<ul style="list-style-type: none"> • An operating company seeking for funding would not in general constitute an AIF • A project company, if qualified as a joint venture, would not primarily constitute an AIF • Equity and certain lending models might constitute an AIF unless an investor retains the decision making power in respect of the investment targets • Donations and Rewards Model would not primarily seem to constitute an AIF • It cannot be ruled out that Crowdfunding platforms 	Typically, neither an operating or project company in France seeking financing Crowd-funding, nor a French Crowd-funding platform, is subject to legislation governing an AIF.	<ul style="list-style-type: none"> • Typical start-up company in general does not constitute an AIF • "Project Company" might constitute AIF → extensive AIFMD regulation for AIF and its manager → manager (AIFM) requires BaFin authorisation • Depending on the structure in detail: funding by means of subordinated loans (<i>Nachrangdarlehen</i>) or contributions under Donations/Rewards Model should not entail an AIF • Sound arguments that Crowdfunding platforms should not constitute AIFM 	<ul style="list-style-type: none"> • The AIFMD has not yet been implemented; future implementation according to the draft proposal of law could affect Crowdfunding platforms if they are considered AIF as defined in the proposed draft law and provided they are not UCITS







	would not constitute an AIFM.			
Payment service regulation	<ul style="list-style-type: none"> "Commercial Agents" exemption might be applicable Pursuant to the current interpretation, transfer of funds through the platform operator's customer deposit account does not constitute money remittance service → However, this interpretation has not been tested and authorisation or notification may be required from the platform providers 	<ul style="list-style-type: none"> Any person providing payment services must be licensed as a payment institution, but exemptions may be obtained from the ACPR for platforms which collect donations in exchange for a definite and clearly defined counterpart having a value commensurate with the donation made. Crowdfunding platforms which arrange for funds for a given project to be collected in an account at a banking institution may require a licence, but an exemption is available under certain conditions for platforms which accept payments from investors within a "limited network" 	<ul style="list-style-type: none"> Transfer of funds through operator may constitute money remittance service → BaFin authorisation required "Commercial Agents" exemption probably not applicable to operators of Crowdfunding platforms 	<ul style="list-style-type: none"> Transfer of funds may constitute money remittance service → BoG license required or "passport"



		<p>or for a “limited range of goods or services.</p> <ul style="list-style-type: none"> Proposed legislation would allow Crowdfunding platforms to process payments of up to €3 million per month, subject to certain conditions. 		
Consumer credit regulation	<ul style="list-style-type: none"> Currently does not apply – existing operators do not give consumer credit If platform provides consumer credit, the provisions arising from the Consumer Protection Act or the Credit Institutions Act or Investment Services Act apply 	<p>If consumer borrowers are permitted on a platform and the Crowdfunding offered is based on the Lending Model consumer-protection rules will apply.</p>	<p>If consumer borrowers are permitted on a platform (Lending Model) there might be implications for the form and content of the lending agreements</p>	<p>The Lending Model is not used in Greece; any provision of loans or other credits, in a professional capacity, is allowed only to credit institutions and certain financial institutions licensed by BoG, or alternatively to credit institutions and certain financial institutions established in other European Union (EU) countries benefiting from the European “passport” to offer services either through a branch or on a cross-border basis without establishment in Greece</p>



Further possible requirements	<ul style="list-style-type: none"> • Fundraising Act (Rahankeräyslaki) • Consumer Protection Act (Kuluttajansuojalaki) • Finnish Act on Preventing and Investigating Money Laundering and Funding Terrorism (Laki rahanpesun ja terrorismin rahoittamisen estämisestä ja selvittämisestä) • Personal Data Act (Henkilötietolaki) 	<ul style="list-style-type: none"> • Regulation of marketing and distance selling may apply. • AML/CFT/sanctions rules may apply. 	<ul style="list-style-type: none"> • German Trade, Commerce and Industry Regulation Act (<i>Gewerbeordnung</i>) • German Act on Money Laundering (<i>Geldwäschegesetz</i>) • German Securities Trading Act (<i>Wertpapierhandelsgesetz</i>) 	<ul style="list-style-type: none"> • Law 3691/2008 on Money Laundering prevention; • Laws 2472/1997 and 3471/2006 on Data Protection; • Law 2251/1994 on Consumer Protection and sales performed from a distance; • Law 2121/1993 on Intellectual Property; • Law 3862/2010 on Payment Services
--------------------------------------	--	---	--	--

Country	Hungary	Ireland	Israel	Italy
Regulation				
General regulation	<ul style="list-style-type: none"> If the Crowdfunding platform facilitates the offering of securities, the operator of the platform may be subject to investment services requirements → licence from the Hungarian supervisory authority required If the Crowdfunding platform facilitates and/or intermediates the granting of loans to the crowdfunded business, such activity may trigger financial services requirements in relation 	<ul style="list-style-type: none"> Lending to corporates is not a regulated activity. Arranging credit for a person acting outside his business may require authorisation as a credit intermediary. Crowdfunding platforms cannot use the term "bank" or any variant of that term in their names or advertising. Crowdfunding platforms must be careful not to provide MiFID investment services such as receipt and transmission of orders and / or investment advice. Non- 	<ul style="list-style-type: none"> If securities are offered, a prospectus is required unless an exemption is available Lending Model platforms may be subject to regulations related to loans If investment advice is provided, a platform may need an investment advisor license A platform may need to register its database if it contains sensitive information of its users 	<ul style="list-style-type: none"> Equity Model is subject to regulated activities regime According to Italian Law 221/2012 platform must restrict offers of securities to shares and quotas in "innovative start-up Italian company" Many Crowdfunding platforms use exclusions and exemptions from regulated activities regime (acting as broker and not as offeror) → position to be cleared after the issuing of Law 221/2012 and the entering



	<p>to the platform operator and individuals granting loans → licence from the Hungarian supervisory authority required</p> <ul style="list-style-type: none"> • Crowdfunding under both the Equity Model and Lending Model could be structured so as to eliminate/limit the risk of triggering licensing requirements • The Donation or Rewards Model do not raise any specific Hungarian regulatory issues 	<p>MiFID investment services which are regulated under the IIA should also be avoided. Of these, the provision of investment advice which includes advice on where to get advice would be relevant for Crowdfunding platforms.</p>	<ul style="list-style-type: none"> • If credit data of borrowers is stored and used, a Lending Model platform may need a license as a credit data service 	<p>into force of the CONSOB Regulation</p> <ul style="list-style-type: none"> • Platform operating Lending Model are not subject to specific legislation addressed to lending Crowdfunding but are subject to the Consolidated Banking Law and relevant regulation, depending on the activity carried out • Depending on the structure in detail: investments under the Donations/Rewards Model do not qualify as investment products
Prospectus requirement	<ul style="list-style-type: none"> • Prospectus requirement for the offering of securities and certain other financial instruments (e.g. shares, bonds, certain derivatives) 	<ul style="list-style-type: none"> • Prospectus requirement may apply depending on the structure and amounts raised by the issuers. 	<ul style="list-style-type: none"> • Prospectus is required for offering securities to the public • Exemptions include: <ul style="list-style-type: none"> ○ Up to 35 investors in 12 months 	<ul style="list-style-type: none"> • Prospectus requirement for offering of securities • Threshold: EUR 5 Mio. per issuer within 12 months







	<ul style="list-style-type: none"> Threshold: EUR 100,000 aggregated issue value for securities offered in all member states of the European Union within a period of 12 months 		<ul style="list-style-type: none"> Certain sophisticated investors 	
AIFMD-regulation	<ul style="list-style-type: none"> Despite the deadline applicable to the adoption and publication of national regulations implementing the provisions of the AIFMD, the Hungarian Parliament has not yet approved any of the laws necessary for the implementation of the AIFMD in Hungary 	AIFMD regulations may be applicable however the Directive provides for an exemption	Israel is not an EU member state and therefore the European Alternative Investment Fund Managers Directive is not applicable	<ul style="list-style-type: none"> From the perspective of Equity Crowdfunding, platforms should not constitute AIFM and innovative start-up should not constitute an AIF (but implementation law has not been passed yet)
Payment service regulation	<ul style="list-style-type: none"> Transfer of funds through the platform operator may constitute money remittance service → licence from the Hungarian supervisory authority required 	Payment services regulations may be applicable, depending on money transmission route chosen.	Israel is not an EU member state and therefore the Payment Services Directive is not applicable	Transfer of funds through operator may constitute money remittance service → Bank of Italy authorisation



	<ul style="list-style-type: none"> Collection and holding of funds as escrow by the platform operator may constitute financial service → licence from the Hungarian supervisory authority required 			
Consumer credit regulation	Depending on the structure used by the platform, consumer credit regulations may be applicable		Regulation of Non-Banking Loans Law, 5753 – 1993 and other consumer regulations may apply to a Lending Model platform	If consumer borrowers are permitted on a platform there are implications for the form and content
Further possible requirements	<ul style="list-style-type: none"> Laws applicable to on-line marketing and contracts Anti money laundering laws Data privacy and data protection laws Consumer credit regulations Consumer protection regulations 	Arranging credit for a person acting outside his business will require authorisation as a credit intermediary.	<ul style="list-style-type: none"> Prohibition on Money Laundering Law, 5760 – 2000 Standard Contracts Law, 5743 – 1982 Consumer Protection Law, 5741 – 1981 	<ul style="list-style-type: none"> Italian Money Laundering law Italian Data Privacy law Italian Law 231/2001



Country	Latvia	Lithuania	Luxembourg	The Netherland
Regulation				
General regulation	<ul style="list-style-type: none"> Theoretically it would be possible to carry out such projects in Latvia. In each situation it is recommended to coordinate the envisaged project with Latvian supervisory authority – Financial and Capital Market Commission and/or involve local counsel. If Crowdfunding platform facilitates offering of securities or other financial instruments or holds money belonging to 	<ul style="list-style-type: none"> If the activities of a Crowdfunding platform are related to the offering, distribution and acquisition of securities, the operator of the platform has to be licensed; No need for licence if Crowdfunding is based on the Lending Model and financing through the loan agreements between professional clients and companies seeking to be financed 	<ul style="list-style-type: none"> If the Crowdfunding platform operates banking, lending or investment services -> a license from the minister, having in his competence the CSSF, could in theory be required <p>If the Crowdfunding platform operates as a multilateral trading facility -> a license from the minister, having in his competence the CSSF, could in theory be required</p>	<ul style="list-style-type: none"> Distinction should be made between the activities of the Crowdfunding platform and the activities of the Crowdfunding entity. For the latter please see the box below. The Crowdfunding platform could be taking up a regulated activity under the FSA due to the fact that it intermediates (or advises) in relation to: <ul style="list-style-type: none"> - consumer credit



	<p>third persons, the operator of the platform most likely provides investment or financial services → FCMC authorisation required</p> <ul style="list-style-type: none"> Depending on the structure in detail: there are sound arguments that loans and contributions under Donations/Rewards Model do not constitute provision of investment or financial services 	<ul style="list-style-type: none"> The Donations or Rewards Model is not qualified as a licensed activity 		<ul style="list-style-type: none"> repayable funds financial instruments other type of financial products (depending on the structuring of the Crowdfunding platform)
Prospectus requirement	<ul style="list-style-type: none"> Prospectus requirement for public offer regarding transferable securities (i.e., offer is expressed to more than 150 individuals in one EU Member State) Threshold: EUR 100.000 per issuer within 12 months. Law also sets out 	<ul style="list-style-type: none"> Prospectus requirement for the offering of securities, investment units and shares of investment companies. Threshold: EUR 100.000 per issuer within 12 months 	<ul style="list-style-type: none"> Prospectus requirement for offers of securities to the public and admission of trading of securities on a regulated market 	<ul style="list-style-type: none"> Prospectus requirement for securities within the meaning of the Prospectus Directive Threshold: EUR 2.500.000 per issuer within 12 months (bear in mind strict selling restriction requirements)



	<p>other exemptions when the prospectus is not required</p> <ul style="list-style-type: none"> Depending on the structure in detail: there are no prospectus requirements for loans or contributions under Donations/Rewards Model 	<ul style="list-style-type: none"> There is no threshold for the investment units and shares of an investment company A prospectus regarding the offering of investment units and shares of investment companies is required in all cases. 		
AIFMD-regulation	<ul style="list-style-type: none"> AIF can be established as pool of assets, joint stock company or as partnership Typical start-up company in general does not constitute an AIF "Project Company" might constitute AIF → extensive AIFMD regulation for AIF and its manager → manager (AIFM) requires FCMC authorisation 	<ul style="list-style-type: none"> The AIFMD is not implemented in the national law 	<ul style="list-style-type: none"> If the Crowdfunding platform would be considered as an AIF, the AIFMD could apply and licencing requirements thereof would have to be complied with. Depending on the form of the Model and the investments, exceptions or derogations might apply. 	<ul style="list-style-type: none"> Crowdfunding structure could constitute an AIF, although regulators have not yet made any comments on this issue to date Notwithstanding the EUR 100 million threshold an AIF that offers participations to retail investors is caught by the AIFMD regime in full



	<ul style="list-style-type: none"> Depending on the structure in detail: funding by means of or contributions under Donations/Rewards Model should not entail an AIF Depending on the scope of the services provided by the Crowdfunding platform, Crowdfunding platforms might be constituted as AIFM. 			<ul style="list-style-type: none"> An additional disclosure regime applies to retail offerings of AIFs and the rules are aimed to ensure transparency and that retail investors receive proper information on their potential participation/investment
Payment service regulation	<ul style="list-style-type: none"> Transfer of funds through operator may constitute money remittance service → FCMC licensing or notification to the FCMC required. "Commercial Agents" exemption probably not applicable to operators of Crowdfunding platforms 	<ul style="list-style-type: none"> The transfer of funds through the operator may be considered as payment services subject to the licensing requirements in Lithuania Exemptions under the Lithuanian law must be assessed in each individual case 	<ul style="list-style-type: none"> The Crowdfunding undertaking may fall within the scope of the PSD. The envisaged services may constitute either (i) money re-mittance (in the event that no account is being created in the name of the payer or the payee) or (ii) payment transaction, which implies an existence of a payment account, at least, in the recipient's side. 	Transfer of funds through operator may constitute a payment service which requires a license as payment institution. In such case Dutch Central Bank authorisation would be required







	<ul style="list-style-type: none"> Other exemption might be that the operator of a Crowdfunding platform uses an external provider or partner for processing payments rather than acting as an intermediary himself 		<ul style="list-style-type: none"> In the event that the Crowdfunding does fall within the scope of the PSD, potential exemption methods would have to be addressed on a case-by-case basis. 	
Consumer credit regulation	If consumer borrowers are permitted on a platform (Lending Model) there are implications for the licence for consumer crediting, form and content of the lending agreements.	If consumer borrowers are permitted on a platform (Lending Model), there are implications for the form and content of lending agreements, including pre-contractual information	With regard to consumer credit regulations, it is possible that Crowdfunding platforms might be considered to perform a banking activity which would in theory require for them to have a licence under the Law on the financial sector (see above).	If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements. The Crowdfunding platform would normally require a license as an intermediary in relation to consumer credit (<i>financieeldienstverlener</i>)

<p>Further possible requirements</p>	<ul style="list-style-type: none"> • Civil Law (in Latvian – <i>Civillikums</i>) • Commercial Law (in Latvian – <i>Komerclikums</i>) • Law on the Prevention of Laundering the Proceeds from Criminal Activity (Money Laundering) and of Terrorist Financing (in Latvian - <i>Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums</i>) • Natural Persons' Data Protection Law (in Latvian – <i>Fizisko personu datu aizsardzības likums</i>) • The Cabinet of Ministers regulations and FCMC regulations in relation to investment services and payment institutions (if any) 	<ul style="list-style-type: none"> • Law of the Republic of Lithuania on the Prevention of Money Laundering and Terrorist Financing (<i>Lith. Lietuvos Respublikos pinigų plovimo ir teroristų finansavimo prevencijos įstatymas</i>) • Law of the Republic of Lithuania on Consumer Credit (<i>Lith. Lietuvos Respublikos vartojimo kredito įstatymas</i>). 	<ul style="list-style-type: none"> • Anti-money laundering law dated 12 November 2004, as amended • Law regulating the access to the occupations of craftsman, tradesman, industrialist and certain liberal professions dated 2 September 2011 	<ul style="list-style-type: none"> • Anti-money laundering regulations (<i>Wet ter voorkoming van witwassen en financieren van terrorisme</i>) • Act on protection of personal data (<i>Wet bescherming persoonsgegevens</i>) • Act on unfair trade practices (<i>Wet oneerlijke handelspraktijken</i>, as implemented in several Dutch acts, including the Dutch Civil Code (<i>Burgerlijk Wetboek</i>)) • Act on the consumer credit (<i>Wet op het consumentenkrediet</i>) • Dutch civil code (<i>Burgerlijk Wetboek</i>), not only in relation to corporate / contract law,
---	---	--	--	--



	<ul style="list-style-type: none">• Consumer Rights Protection Law (in Latvian – <i>Patērētāju tiesību aizsardzības likums</i>)			but also implementing provisions on consumer credit and unfair trade practices
--	---	--	--	--



Country Regulation	Portugal 	Romania 	Slovak Republic 	Slovenia 
General regulation	<ul style="list-style-type: none"> • Crowdfunding Platforms operating under the Donation and Rewards Model are not subject to regulation • Crowdfunding Platforms operating under the Pre-sale Sub-model are not subject to regulation • Crowdfunding Platforms in Portugal that offer services under the traditional Lending Model and the Equity Model, will fall under the supervision of Bank of Portugal and 	<ul style="list-style-type: none"> • In case the Crowdfunding platform supports financing through investment products or securities, the platform operator is deemed to provide financial services and ASF authorisation will be required. • Exception for: (i) securities targeting solely qualified investors or fewer than 150 natural persons or legal entities, (ii) securities offered or allotted in connection with a merger or winding-up, (iii) 	<p>A project company acting under the Equity Model can be qualified as an AIF under the Collective Investment Act → licence from the NBS required</p> <ul style="list-style-type: none"> • Crowdfunding platform facilitating offering of securities (which is very likely under the Equity Model) would be viewed as providing investment service and therefore regulated under the Securities and Investment Services Act 	<ul style="list-style-type: none"> • Financial services and transactions related to offerings of securities provided by a Crowdfunding platform trigger requirement for a licence by the Securities Market Agency • Intermediary services with respect to consumer credit and other loan agreements require a licence by the Bank of Slovenia or the Securities Market Agency <p>Donations and Reward Crowdfunding models</p>



	Securities Exchange Commission (CMVM)	<p>dividends paid in the form of shares to existing shareholders and (iv) in other cases specified by regulations issued by ASF.</p> <ul style="list-style-type: none"> The Donations/ Rewards Model are not subject to the public-offering rules. 	<p>→ licence from the NBS required</p> <ul style="list-style-type: none"> A project company or a Crowdfunding platform acting under the Lending Model is likely not a regulated entity → no licence required A project company or a Crowdfunding platform acting under the Donations or Rewards Model is likely not a regulated entity → no licence required 	would among others likely have tax, game of chance and consumer protection legal implications
Prospectus requirement	<ul style="list-style-type: none"> Prospectus requirement for offering securities Exemptions: if the nominal value of securities is equal or higher than EUR 100.000 or if the price of subscription/sale per subscriber is equal or higher than EUR 100.000 	<ul style="list-style-type: none"> Prospectus requirement for the offering of securities or investment products. Threshold: EUR 1.000.000 for shares and EUR 200.000 for bonds. The donations/ rewards model are not subject to 	<ul style="list-style-type: none"> Prospectus must be published for offering securities Threshold: EUR 100.000 in the EU issuer within 12 months Depending on the structure in detail: no prospectus requirements 	<ul style="list-style-type: none"> Prospectus requirement for offer of securities Threshold: EUR 100.000 in the European Union within 12 months Other most relevant exceptions: (i) offering of securities to sophisticated investors only, or (ii)



		the public-offering rules.	for simple loans or contributions under Donations/Rewards Model	<p>offering of securities to up to 150 natural or legal persons, who are not sophisticated investors</p> <ul style="list-style-type: none"> Simplified prospectus possible for offerings of securities below or equal to EUR 5.000.000 in the European Union within 12 months
AIFMD-regulation	<ul style="list-style-type: none"> AIFMD Directive has not been implemented in Portugal until now. According to AIFMD, companies that submit projects to Crowdfunding platforms could be deemed as AIF's, and therefore their management qualified as AIFM's. 	<p>AIMFD Regulation not implemented, but a preliminary Proposal is subject to public debates. As per the Proposal:</p> <ul style="list-style-type: none"> The following do not constitute an AIF: holdings, pension funds (occupational pension), supranational institutions (ECB, EIB, EIF etc.), NBR, local investment authorities, employee participation schemes, special purpose 	<ul style="list-style-type: none"> An operating company should not be regulated under the Collective Investment Act and should not be qualified as an AIF → no licence required Crowdfunding platform under Equity Model will likely be regulated → licence from the NBS required 	<ul style="list-style-type: none"> AIFMD has not yet been implemented in Slovenia AIFs presently regulated by the Investment Trusts and Management Companies Act and the Venture Capital Companies Act Crowdfunding platform might fall under the AIF regulation and future regulation implementing the AIFMD in Slovenia



		<p>securitisation entities.</p> <ul style="list-style-type: none"> • Extensive AIFMD regulation for AIF and its manager – ASF authorisation required. • The donations/ rewards model will not be subject to the AIMFD Regulation. • The Crowdfunding platform will most likely not be subject to the AIMFD Regulation. 	<p>A project company acting under the Equity Model could possibly be qualified as an AIF → license from the NBS required</p> <ul style="list-style-type: none"> • A project company / Crowdfunding platform acting under the Lending Model should not be a regulated entity → no licence required • A project company / Crowdfunding platform acting under the Donations or Rewards Model should not be a regulated entity → no licence required 	<ul style="list-style-type: none"> • Intermediary services with respect to consumer credit and other loan agreements would require a licence by the Bank of Slovenia or the Securities Market Agency
--	--	---	--	---








Payment service regulation	<ul style="list-style-type: none"> • Transfer of funds through operator may constitute money remittance service, and therefore an authorisation from Bank of Portugal would be required • Exemption for “Commercial Agents” may be applicable to Crowdfunding platforms 	<ul style="list-style-type: none"> • Transfer of funds through payment services operator may constitute payment services, requiring NBR authorisation. • Payment transactions through a commercial agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or payee are not subject to the payment services regulation. 	<ul style="list-style-type: none"> • The provision of payment services as defined under the Payment Services Act by a Crowdfunding platform triggers licensing requirements (licence granted by the NBS) 	<ul style="list-style-type: none"> • Remittance of cash payments or transfer of funds by an intermediary between a customer and a provider of goods and services constitutes provision of payment services, which requires a licence by the Bank of Slovenia. • A Crowdfunding platform might rely on the “technical service provider” exemption.
Consumer credit regulation	If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements	If the financed initiator is a natural person, certain requests must be observed in the lending agreements.	Consumer Protection Act only applies to individuals who are consumers (i.e. not entrepreneurs). Consumer Credit Act does not apply to companies.	Consumer Credit Act (<i>Zakon o potrošniških kreditih</i>) regulating the content and offering of consumer credit applies only to credit and loan agreements entered into with natural persons who are acting as consumers, which means acting outside of their employment or gainful activity.



<p>Further possible requirements</p>	<ul style="list-style-type: none"> • Portuguese Money Laundering Regime • Portuguese Venture Capital Regime 	<ul style="list-style-type: none"> • Romanian Banking Law or, as applicable, IFN Law. • Law no. 656/2002 on preventing and sanctioning money laundering and instituting measures for preventing and fighting against financing the acts of terrorism. • Consumer Protection Law (Ordinance no. 21/1992 regarding consumer protection. 	<ul style="list-style-type: none"> • Act No. 40/1964 the Civil Code • Act No. 513/1991 the Commercial Code • Act No. 455/1991 the Trade Licence Act • Act No. 203/2011 on Collective Investment • Act No. 250/2007 on Consumer Protection • Act No. 63/1973 on Public Collections and Lotteries 	<ul style="list-style-type: none"> • Consumer Protection Act (<i>Zakon o varstvu potrošnikov</i>) • Consumer Protection against Unfair Commercial Practices Act (<i>Zakon o varstvu potrošnikov pred nepoštenimi poslovnimi praksami</i>) • Prevention of Money Laundering and Terrorist Financing Act (<i>Zakon o preprečevanju pranja denarja in financiranja terorizma</i>) • Book Entry Securities Act (<i>Zakon o nematerializiranih vrednostnih papirjih</i>) • Personal Data Protection Act (<i>Zakon o varstvu osebnih podatkov</i>)
---	---	--	---	---



				<ul style="list-style-type: none"> • Investment Trusts and Management Companies Act (<i>Zakon o investicijskih skladih in družbah za upravljanje</i>) • Venture Capital Companies Act (<i>Zakon o družbah tveganega kapitala</i>) • Supportive Environment for Entrepreneurship Act (<i>Zakon o podpornem okolju za podjetništvo</i>) • Humanitarian Agencies Act (<i>Zakon o humanitarnih organizacijah</i>) • Code of Obligations (<i>Obligacijski Zakonik</i>)
--	--	--	--	--

Country	Spain	Sweden	Switzerland	United Kingdom	United States
Regulation					
General regulation	<ul style="list-style-type: none"> Crowdfunding platforms operating the Equity Model are not treated as performing financial services, even if a number of platforms appear to fall within the scope of MiFID and Spanish financial services law Crowdfunding platforms operating the Lending Model are generally regulated by the 	<ul style="list-style-type: none"> If CrowdFunding platform facilitates offering of securities or investment products, the operator of the platform provides financial services → S-FSA license or co-operation with licensed firm required. Possible to offer investments in limited liability companies formed as “private”, with 	<p>Banking Act:</p> <ul style="list-style-type: none"> Collection of funds, keeping of accounts in the name of investors or acceptance of deposits from investors might bring operator within activities covered by Banking Act → FINMA license required 	<ul style="list-style-type: none"> Equity Model often entails conducting regulated securities business → FCA authorisation required Lending Model is due to become a regulated activity from April 2014 → FCA authorisation will be required. Many Equity Model platforms use exclusions and 	<p>New rules are yet to be published but anticipated before the end of 2013, however the JOBS Act requires that:</p> <ul style="list-style-type: none"> Issuers are limited to an annual aggregate capital raise of \$1,000,000 Investors are limited to annual aggregate investments based on annual income or net worth (i) if annual income or net worth are less than \$100,000 - the limit is the greater of \$2,000 or 5% of their annual income or net worth; and (ii) if annual income or net worth

	<p>regime for corporations</p> <ul style="list-style-type: none"> • Crowdfunding platforms operating the Donations/Rewards Model are not subject to regulation. • No Crowdfunding platforms are currently supervised by the Bank of Spain or the CNMV 	<p>limitations on the number of investors</p>	<p>CISA:</p> <ul style="list-style-type: none"> • Pooling and subsequent collective investment of funds into a company might bring operator within scope of CISA → FINMA license required • Exemptions for direct investments into an operating company or in case investment decision remains with the investor <p>SESTA:</p> <ul style="list-style-type: none"> • Trading of shares, keeping of accounts or 	<p>exemptions from regulated activities regime</p> <p>→ enhanced policing likely to reduce ability of firms to successfully rely on exemptions from regulation</p> <ul style="list-style-type: none"> • Donations/Rewards Model is not subject to financial services regulation. • In Equity Model, where profit share is not channelled through a standard corporate issuer/shareholder relationship, investment may be characterised as collective investment scheme → 	<p>is greater than \$100,000 – the limit is 10% of the annual income or net worth up to maximum of \$100,000</p> <ul style="list-style-type: none"> • The transaction must be conducted through a registered broker or funding portal • The issuer must comply with the filing, disclosure, advertising, compensation, reporting and other requirements set forth in Section 4A(b) of the Securities Act of 1933, as amended • Funding Portal limitations (which would not apply to broker-dealers conducting a crowdfunded offering) <ul style="list-style-type: none"> • cannot provide investment advice
--	--	---	--	--	--



			<p>underwriting of securities could result in operator of platform being a securities dealer → FINMA authorization required</p> <ul style="list-style-type: none"> • Limitation of purpose of the platform to exchange of information (e.g. price, names) and no simultaneous exchange of offers, conclusion of contracts or settlement of contracts 	<p>prohibition on promoting collective investment schemes to retail investors</p> <p>New FCA rules in force from 1 January 2014 → prohibition on promoting Special Purpose Vehicles ("SPVs") to retail investors.</p>	<ul style="list-style-type: none"> • cannot receive or hold investor funds or securities • cannot compensate employees, agents or others for solicitation, or commission-based sales of securities posted on the website • cannot advertise specific offerings, only the portal website
--	--	--	---	---	--



Prospectus requirement	<ul style="list-style-type: none"> The companies regime in Spain does not lend itself to the offering of shares → the Equity Model is generally operated by means of joint accounts to which the prospectus regime does not apply 	<p>Prospectus requirement for are generally not a problem as threshold is set high EUR 2.500.000 within 12 months</p>	<ul style="list-style-type: none"> Prospectus requirement for public offer for subscription of equity securities or bonds for companies advertising on the platform; not the platform itself Platform may be liable for incorrect, misleading or incomplete information in issuing prospectuses or similar offering material 	<ul style="list-style-type: none"> Prospectus requirement for offering of transferable securities (such as shares) <p>Threshold: EUR 5 million per issuer within 12 months</p>	<p>No prospectus requirement but offering materials must include necessary information on the potential risks and rewards of an investment:</p> <ul style="list-style-type: none"> Financial information disclosure depends on the aggregate amount offered (including crowdfunded offerings in the preceding 12 months): <ul style="list-style-type: none"> For offerings up to \$100,000 - issuer's most recently filed income tax returns and its financial statements certified by its principal executive officer; For offerings exceeding \$100,000 but less than \$500,000 - financial
-------------------------------	--	--	--	--	---



					<p>statements reviewed by an independent public accountant;</p> <ul style="list-style-type: none">• For offerings exceeding \$500,000 - audited financial statements• Issuer information: name, legal status, physical address, the names of the directors and officers holding more than 20 percent of the shares of the issuer• Offering: the anticipated business plan of the issuer, the target offering amount, the deadline to reach the target offering amount and the price to the public of the securities.
--	--	--	--	--	--



					<ul style="list-style-type: none">• Structure: the ownership and capital structure of the issuer, including terms of the securities being offered• Valuation: how the securities offered were valued and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and• Risks: the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties
--	--	--	--	--	---



AIFMD-regulation	<ul style="list-style-type: none"> • Crowdfunding platforms could entail offering an AIF, although the regulators have not yet made public pronouncements on the issue 	<ul style="list-style-type: none"> • Generally not a problem, typical start-up company not subject to AIFMD • Platform could be considered as AIF if managing investments on behalf of investors 		<ul style="list-style-type: none"> • Crowdfunding structure could constitute an AIF if it includes profit share arrangements otherwise than in a commercial company. <p>Light-touch regime for managers with management assets under EUR 100 million → FCA authorisation and registration and reporting requirements, but Directive marketing restrictions not applied</p>	The U.S. is not required to adopt the AIFMD, nor would it apply to U.S. crowdfunded offerings
Payment service regulation	Transfer of funds through operator does not constitute money remittance service	<ul style="list-style-type: none"> • Transfer of funds through operator may constitute money remittance service 		<ul style="list-style-type: none"> • Transfer of funds through operator may constitute money remittance service → FCA 	Funding portals will not be permitted to receive or hold investor funds; new rules are expected to impose a

		→ S-FSA authorisation required		<p>authorisation would be required.</p> <ul style="list-style-type: none"> Exemption for "Commercial Agents" likely to apply to operators of Crowdfunding platforms. 	<p>requirement for funds to be held by a bank or trust company or other qualified custodian (a qualified third-party escrow agent)</p>
Consumer credit regulation	<p>If consumer borrowers are permitted on a platform (Lending Model) there are implications for the form and content of the lending agreements</p>		<p>Activity as intermediary of consumer credit agreements (charging of fees for intermediary service) → FINMA authorization required</p>	<p>If consumer borrowers are permitted on a platform (Lending Model) a Consumer Credit licence is required → implications for the form and content of lending agreements → Consumer Credit regulation is being transferred from Office of Fair Trading to FCA</p>	



Further possible requirements	Draft Bill that supports entrepreneurs	<ul style="list-style-type: none"> • Swedish Personal Data Act; • Swedish Anti-Money Laundering Act; • Swedish Deposit-taking Activities Act; • Swedish Consumer Credit Act 	<ul style="list-style-type: none"> • Anti Money Laundering Act (<i>Geldwäschereigesetz</i>): Services regarding flow of funds, keeping of securities or of accounts for investors → Operator of platform to be affiliated to a recognized self-regulatory organization or to obtain a license from FINMA • Data Protection Act (<i>Datenschutzgesetz</i>) • Future Financial Service Act (<i>Finanzdienstleistungsgesetz</i>) 	Money Laundering Regulations 2007	<p>Title III: Investor annual investment limits:</p> <ul style="list-style-type: none"> • Investors with an annual income or net worth of less than \$100,000 may invest the greater of \$2,000 or 5% of their annual income or net worth in any 12 month period • Investors with an annual income or net worth greater than \$100,000 may investment the greater of \$100,000 or 10% of their annual income or net worth in any 12 month period <p>Investor resale restriction:</p> <ul style="list-style-type: none"> • Investors must hold their securities for one year before they can transfer their holdings; certain exceptions include transfers:
-------------------------------	--	---	---	-----------------------------------	---



					<ul style="list-style-type: none"> • to the issuer • to an accredited investor • pursuant to an offering registered with the SEC, or • to the investor's family members <p>Both funding portals and broker-dealers must (fraud prevention requirements):</p> <ul style="list-style-type: none"> • Take measures to reduce the risk of fraud, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20% of the outstanding equity of every issuer whose securities are offered
--	--	--	--	--	---



					<ul style="list-style-type: none">• Prohibit its directors, officers, or partners, or such person performing a similar function, from having any financial interest in an issuer using its services• Limit crowdfunding offerings to domestic issuers that are neither reporting companies under the Securities Exchange Act of 1934 nor investment companies• Reject any issuers associated with certain “bad actors” from participating, including persons with criminal convictions or court injunction in connection with the purchase or sale securities
--	--	--	--	--	---



					<p>Additional requirements:</p> <p>Both funding portals and broker-dealers must:</p> <ul style="list-style-type: none">• Ensure that each investor: (i) reviews such investor-education material; (ii) positively affirms that the he or she understands that there is a risk of losing their entire investment, and that such investor could bear such a loss; and (iii) answer questions demonstrating: (1) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers; and (2) an understanding of the risk of illiquidity.• Observe annual limits on issuers to sell up to an aggregate of \$1,000,000 of
--	--	--	--	--	--



					<p>its securities during any 12 month period</p> <ul style="list-style-type: none"> • Ensure that all offering proceeds are only provided to the issuer when the minimum offering amount is met or exceeded • Permit investors to cancel their commitments to invest • Ensure that no investor exceeds the maximum amount an individual is permitted to invest in such securities • Implement measures to protect the privacy of information collected from investors • Comply with U.S. Anti-Money Laundering laws
--	--	--	--	--	--

BUILDING A PAN-EUROPEAN CROWDFUNDING ECOSYSTEM

by raising professional standards,
fostering transparency, creating
networking opportunities,
and undertaking industry and
impact research.

**The EUROPEAN
CROWDFUNDING
NETWORK**

www.europecrowdfunding.org